

# GLOBALIZING COMMERCIAL LITIGATION

**Jens Dammann and Henry Hansmann<sup>1</sup>**

**February 2008**

Jens Dammann  
University of Texas School of Law  
727 East Dean Keeton Street  
Austin, Texas 78705  
JDammann@law.utexas.edu

Henry Hansmann  
Yale Law School  
P.O. Box 208215  
New Haven, CT 06520-8215  
henry.hansmann@yale.edu

---

<sup>1</sup> Dammann is Assistant Professor at the University of Texas School of Law. Hansmann is Augustus E. Lines Professor of Law at the Yale Law School.

Earlier versions of this essay were presented at the Comparative Law and Economics Forum in Barcelona, the American Economic Association in Chicago, the Stresa Lectures in Rome and Stresa, the International Society for the New Institutional Economics in Helsinki, the European Association for Law and Economics in Copenhagen, and at law school workshops at Cardozo, Columbia, Fordham, the University of Texas, and Yale. The authors are grateful to the participants in those meetings and, for further valuable discussions and comments, in particular to Akhil Amar, John Armour, Hans Baade, Abraham Bell, Mitchell Berman, Bernard Black, Stephen Burbank, Daniela Caruso, Kevin Clermont, Owen Fiss, Brett Frischman, Luis Garicano, Mark Gergen, Andrew Guzman, Oona Hathaway, Guy Horsmans, Emily Kadens, Catherine Kessedjian, Kate Litvak, Richard Markovits, Richard Norridge, Eric Pan, Michael Reisman, Judith Resnik, Ivan Ribeiro, Linda Silberman, Gary Simson, Richard Squire, Patrick Woolley, and Ernest Young.

**Abstract:**  
**GLOBALIZING COMMERCIAL LITIGATION**  
**Jens Dammann and Henry Hansmann**

The world's nations vary widely in the quality of their judicial systems. In some jurisdictions, the courts resolve commercial disputes quickly, fairly, and economically. In others, they are slow, inefficient, incompetent, biased, or corrupt. These differences are important not just for litigants, but for nations as a whole: effective courts are important for economic development. A natural implication is that countries with underperforming judiciaries should reform their courts. Yet reform is both difficult and slow. Another way to deal with a dysfunctional court system is for litigants from afflicted nations to have their commercial disputes adjudicated in the courts of other nations that have better-functioning judicial systems. We explore here the promise of such extraterritorial litigation and conclude that it is strong, particularly in light of a communications revolution that is making litigation at a distance increasingly feasible.

While available data suggests that the volume of extraterritorial litigation is presently small, a set of basic legal reforms could eventually change that situation dramatically. To create incentives for adopting those reforms, it is essential to provide jurisdictions with a strong incentive to attract foreign litigants. The best way to achieve this is to allow jurisdictions to impose higher court fees in cases between foreign litigants that do not have substantial ties to the forum state. This may require an important adjustment in the legal culture. But only by abandoning formal equality in court fees is it likely that real global equality in access to judicial services can be accomplished.

## TABLE OF CONTENTS

I.	Introduction .....	3
II.	Contrasts in National Judiciaries .....	5
III.	The Promise of Extraterritorial Litigation .....	8
A.	Giving Litigants Access to Better Courts .....	9
B.	An Improved Contracting Environment .....	9
C.	Improvements in Judicial Systems.....	10
1.	Competition.....	10
2.	Comparing Systems .....	10
3.	Specialization .....	11
4.	Courts in States of Origin .....	12
IV.	Potential Problems .....	12
A.	Informational Asymmetries .....	12
1.	Taking Advantage of Uninformed Parties .....	12
2.	Lawyer-Client Agency Problems.....	13
B.	Negative Externalities.....	14
1.	Less Refinement of Origin State's Law.....	14
a.	Precedent.....	15
b.	Judicial Expertise .....	16
c.	Redistribution.....	16
2.	Weakening Voice by Exit .....	17
3.	Burdening Witnesses .....	18
C.	Sovereignty, Dignity, and Protectionism.....	18
D.	Extraterritorial Litigation in Other Fields of Law.....	20
V.	Practical Obstacles .....	22
A.	Distance.....	22
B.	Language.....	22
C.	Different Legal and Commercial Cultures.....	22
D.	Availability of Legal Counsel .....	23
E.	Summing Up .....	24
VI.	The Inadequacies of Arbitration .....	25
A.	Empirical Evidence .....	25
B.	International Arbitration .....	26
C.	Arbitration's Handicaps .....	27
D.	Can Better Forms of Arbitration Be Devised?.....	30
VII.	Legal Obstacles: Jurisdiction and Enforcement.....	31
A.	The United States.....	32
B.	The European Union .....	33
C.	Internationally .....	35
VIII.	Evidence of Demand and Practice .....	38
A.	The United States.....	39
B.	The European Union .....	41
C.	Among Fully Sovereign Nations .....	42
IX.	Necessary Legal Reforms .....	42
X.	Creating the Right Incentives.....	44

A.	Potential Motives to Attract Foreign Litigants .....	44
1.	Procuring Business for Lawyers and Other Local Services.....	44
2.	Altruism .....	46
3.	Court Fees .....	46
B.	Restrictions on Differentiated Court Fees.....	48
1.	The United States.....	48
a.	The Commerce Clause.....	48
b.	The Privileges and Immunities Clause .....	51
2.	Europe .....	52
3.	Globally.....	54
C.	A Change in Legal Culture .....	55
XI.	Conclusion .....	56

## I. Introduction

The world's nations vary widely in the quality of their judicial systems. In some jurisdictions, the courts resolve commercial disputes quickly, fairly, and economically. In others, they are slow, inefficient, incompetent, biased, or corrupt. Weak court systems are a particularly conspicuous problem for developing and transition economies. Yet there are striking disparities in the quality of courts even among developed countries.<sup>2</sup>

Effective courts are central to sustained economic development. Badly performing courts are a burden not only for litigants, but for nations as a whole.<sup>3</sup> An obvious implication is that countries with underperforming courts should reform them. Yet experience has shown reform to be both difficult and slow,<sup>4</sup> especially where the independence and integrity of the judiciary are in question.

There exists, however, another approach to dealing with a dysfunctional court system—and one that can go hand in hand with domestic judicial reform. The law can enable litigants from afflicted countries to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems. We explore here the promise of such extraterritorial litigation, and conclude that it is strong.

While the volume of extraterritorial litigation is presently small, we argue that considerable benefits could be reaped if such litigation were to become more widely available. Admittedly, private arbitration services already provide an important alternative to domestic courts, and their role will and should continue to expand. However, when it comes to offering principled adjudication, public courts enjoy a number of structural advantages over private arbitration services.<sup>5</sup> Consequently, if litigants in commercial cases are to be given alternatives to their domestic courts, the best solution is to give them access to the public courts of other states. This will require that states with strong courts accept broad jurisdiction over purely domestic commercial disputes from other states, and that the latter states recognize this jurisdiction and expeditiously enforce the resulting judgments—all of which will require international legal reforms.

To instill motivation for adopting these reforms and for undertaking the practical steps needed to accommodate extraterritorial litigation, it is also essential to provide jurisdictions with a strong incentive to attract foreign litigants. At present, the main incentive is to create business for the local bar and other local service providers. However, this state of affairs has obvious drawbacks. In particular, it drives jurisdictions to force foreign litigants to make extensive use of local lawyers and other local service providers, thereby rendering extraterritorial litigation unattractive for all but very high-stakes cases. A superior approach, we argue, is to enable jurisdictions to charge higher, more remunerative court fees for hearing purely foreign

---

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *infra* Part VI.

cases. This requires altering the norms in many jurisdictions that seem to bar the imposition of higher court fees on foreign litigants than on domestic litigants—norms that have the ironic consequence of frustrating rather than furthering true international equality in access to judicial services.

The issues we discuss here are particularly timely for two important reasons. First, technological advances in the field of telecommunications and transportation make it increasingly feasible for litigants to use high-quality courts located in foreign jurisdictions. Many courts already allow for the electronic filing of documents<sup>6</sup> and even make use of videoconferencing technology,<sup>7</sup> thereby reducing the inconvenience of litigating in distant forums. It seems entirely predictable that, as technologies such as videoconferencing mature, it will be increasingly possible to conduct litigation without requiring that parties and witnesses appear physically before a judge. This promises, in turn, that it will become practicable to conduct litigation in remote courts both conveniently and inexpensively. Just as residents of New York City now commonly obtain assistance with computer software or utility bills telephonically from service personnel in Bangalore, India, it should soon be possible for merchants in Bangalore to have their local commercial disputes decided in New York courts via the internet.

Second, the increasing pace of global commerce is already creating pressures for legal reforms that could dramatically improve the legal environment for extraterritorial litigation. The most important development in this respect is the 2005

---

<sup>6</sup> For example, certain courts in New York, Connecticut and Delaware fall into this category. *See, e.g.*, The Commercial Division of the State of New York, Electronic Filing Overview, <http://www.nycourts.gov/supctmanh/e-filing.htm> (last visited Feb. 29, 2008); State of Connecticut Judicial Branch, Welcome to e-filing, <http://www.jud.ct.gov/external/super/e-services/efile/> (last visited Feb. 29, 2008); Court of Chancery, Administrative Directive of the Chancellor of the Court of Chancery of the State of Delaware No. 2003-1, eFile Administrative Procedures, Oct. 10, 2003, available at [http://courts.delaware.gov/Rules/?AD2003\\_1.pdf](http://courts.delaware.gov/Rules/?AD2003_1.pdf). *Cf. also* FED. R CIV. P. 5 (allowing courts to adopt rules permitting or requiring papers to be filed by electronic means).

<sup>7</sup> *See* Meghan Dunn & Rebecca Norwick, Report of a Survey of Videoconferencing in the Courts of Appeals (2006) (on file with authors) (noting that “[v]ideoconferencing is used for conducting oral arguments in the Second, Third, Eighth, Ninth, and Tenth Circuits”). Rule 43 of the Federal Rules of Civil Procedure allows the use of videoconferencing technology for witness testimony “or good cause shown in compelling circumstances and upon appropriate safeguards.” State courts are also making increasing use of videoconferencing technology. *Cf., e.g.*, Carrie A. O'Brien, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 383 n.125 (2002) (noting that pretrial hearings at the North Carolina Business Court can be held using videoconferencing technology); Hugh Calkins, Column, *Something About Technology: Videoconferencing Revisited*, 20 MAINE BAR J. 76, 76-78 (2005) (describing the use of videoconferencing technology by Maine courts); Lisa L. Granite, *Special Report: Legal Tech 2006: Technology Gradually Filtering into Pennsylvania's Courtrooms*, 28 PENNSYLVANIA LAWYER 40, 42 (2006) (noting that “[t]wenty-three counties have either videoconferencing equipment or Web cameras (these can be used for videoconferencing and are often more cost-effective) in at least one courtroom”). The use of videoconferencing technology for judicial purposes can be seen in other countries as well. For example, in the United Kingdom, the Access to Justice Act of 1999 specifically provides that courts can use videoconferencing for civil hearings provided that the parties consent. Access to Justice Act, 1999, c. 22 (Eng.).

Hague Convention on Choice of Court Agreements,<sup>8</sup> which—if and when it comes into force—promises to facilitate the recognition and enforcement of foreign court judgments. As has traditionally been the case with the law and literature on choice of law and choice of forum, however, the Convention applies only to international cases,<sup>9</sup> which principally means cases involving parties from different states.<sup>10</sup> Our concern here, in contrast, is with creating access to foreign courts for litigants *from a single jurisdiction* whose dispute does not, other than in the parties' choice of law and forum, have international elements. Nonetheless, the reforms that will facilitate free choice of forum for international disputes are highly complementary to those needed for free choice of forum in purely domestic disputes.

We are concerned here, we should emphasize, only with disputes involving commercial contracts between private parties, and not with litigation in general. More particularly, we limit our focus to litigation in which all parties consent to employing the foreign court, either by means of a choice of forum clause in their original contract or by mutual agreement after their dispute arises.

This article proceeds as follows: Part II surveys the great differences in the quality of judicial services across jurisdictions, including developed nations. Part III assesses the potential role of extraterritorial litigation in general, and in ameliorating the problems of weak local courts in particular. Part IV addresses potential pitfalls of extraterritorial litigation for commercial contracts, and argues that its net advantages are more clear-cut than those offered by the more frequently discussed and still-controversial policy of free choice of regime for corporate law. Part V examines the practical obstacles to extraterritorial litigation, such as distance, language, and international differences in commercial and legal culture. Part VI explores the reasons why arbitration offers an inadequate alternative to litigation in the public courts of other nations. Legal obstacles to extraterritorial litigation are analyzed in Part VII, with an emphasis on problems of jurisdiction and enforcement. Part VIII explores the available evidence on the current extent of extraterritorial litigation, indicating that the potential demand is substantial but the current practice is quite limited. Appropriate legal reforms for facilitating extraterritorial litigation are the subject of Part IX. Part X then turns to the crucial question of incentives for states to accept extraterritorial litigation, and the reforms in court fees that are needed to improve those incentives. Part XI concludes.

## II. Contrasts in National Judiciaries

Differences across nations in the quality of courts are profound. While some countries boast courts that are profusely praised for their excellence,<sup>11</sup> others have

---

<sup>8</sup> Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

<sup>9</sup> See *id.* art. 1(1).

<sup>10</sup> See *infra* Part VII.A.4

<sup>11</sup> The paradigm is Delaware's Chancery Court which is profusely praised as a forum for corporate law cases. See, e.g., Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 146 (2001) ("The Delaware Chancery Court, for instance, is renowned for its expertise in corporate law matters."); Brett H. McDonnell, *Two Cheers for Corporate Law*

courts that are badly failing. Lack of judicial independence,<sup>12</sup> corrupt and biased judges,<sup>13</sup> long delays,<sup>14</sup> and highly formalistic procedures,<sup>15</sup> are among the shortcomings frequently noted.

The problems emphasized in studies of individual countries<sup>16</sup> are revealed as well in quantitative measures of the performance of judicial systems around the world. The most extensive and systematic data have been assembled by the *Lex Mundi* project, which developed estimates of the time required in the courts of 109 nations to obtain and enforce judgments in lawsuits involving commonplace disputes. The results varied widely. The mean time required to collect against the writer of a bad check, for example, was 234 days, with 12 nations (including the U.S.) requiring less than 75 days and 14 requiring more than 400 days.<sup>17</sup> While speed is not, of course, the only important factor in adjudication, such large disparities suggest real differences in the quality of justice. Similarly stark variations can be seen among the 219 nations for which the World Bank has estimated a numerical “rule of law” index, which includes the effectiveness of contract enforcement among its components.<sup>18</sup>

---

*Federalism*, 30 IOWA J. CORP. L. 99, 106 (2004) (noting that an “important advantage” of Delaware as a state of incorporation “is its Chancery Court, which can move quickly and has specialized expertise”); Leo E. Strine, Jr., “Mediation-Only” Filings in the Delaware Court of Chancery: Can New Value be Added by One of America’s Business Courts?, 53 DUKE L.J. 585, 588 (2003) (“The State of Delaware’s investment in a Chancery Court and a Supreme Court that can act with the speed and expertise to meet the business community’s needs is an important element of service it provides to its corporate domiciliaries and their stockholders.”)

<sup>12</sup> See, e.g., Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. LAW 715, 717 (2004) (noting that in Mexico, “the judiciary has been more independent in theory than in fact”); Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Growth* 18, 23 (U. Chic. L. & Econ., Olin Working Paper No. 275, 2006), available at <http://ssrn.com/abstract=880125> (noting corruption, lack of judicial independence, and poor training of judges in China).

<sup>13</sup> See, e.g., Ethan S. Burger, *Corruption in the Russian Arbitrazh Courts: Will there be Significant Progress in the Near Term?*, 38 INT’L. LAW. 15, 22 (2004) (stating that corruption is a “significant problem”).

<sup>14</sup> See, e.g., Bryan Bertram, Note, *Building Fortress India: Should a Federal Law be Created to Address Piracy Concerns in the United States-Indian Business Process Outsourcing Relationship?*, 29 B.C. INT’L & COMP. L. REV. 245, 258 (2006) (claiming that Indian courts are “exceedingly slow”); Priti H. Doshi, Note, *Copyright Problems in India Affecting Hollywood and “Bollywood”*, 26 SUFFOLK TRANSNAT’L L. REV. 295, 322 (2003) (noting that Indian courts are “exceedingly slow and backlogged”); Tracy S. Work, Comment, *India Satisfies Its Jones for Arbitration: New Arbitration Law in India*, 10 TRANSNAT’L LAW. 217, 224. (1997) (claiming that Indian courts are “often expensive, uncertain, and riddled with procedural delay”).

<sup>15</sup> See, e.g., Kossick, *supra* note 12, at 715-717 (describing judicial proceedings in Mexico as “highly formalistic”).

<sup>16</sup> See the sources cited *supra* notes 12—15.

<sup>17</sup> Simeon Djankov, Rafael La Porta, Florencio Lopez-De-Silanes, & Andrei Shleifer, *Courts*, 118 Q. J. ECON. 453, 494-500 (2003). Cf. also EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), EUROPEAN JUDICIAL SYSTEMS 89 (2006) (showing that the percentage of cases still pending after three years varies considerably across European countries), available at [http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ\\_2006\\_eng.pdf](http://www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2006/CEPEJ_2006_eng.pdf).

<sup>18</sup> Daniel Kaufmann, Art Kraay, & Massimo Mastruzzi, *Governance Matters VI: Governance Indicators for 1996–2006* 89-90, World Bank Policy Research Working Paper 4280, July 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979). The rule of law index seeks to capture “the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of



Problems with courts are most conspicuous in developing and formerly socialist nations. Large disparities in the quality of judicial services can also be found, however, among countries with well-developed market economies. The *Lex Mundi* project estimated, for example, that 664 days would be required to collect on a bad check in the notoriously slow courts of Italy.<sup>19</sup>

These disparities have important consequences. Bad courts are harmful, not just to individual litigants, but to the welfare of society as a whole. Douglass North has gone so far as to assert that “the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.”<sup>20</sup> Recent empirical research has tended to confirm the relationship between weak courts and a weak economy, finding correlation between the quality of courts and various measures of economic performance. And while correlation is not the same as causation, there is substantial evidence in the literature that a well-functioning judiciary is an important precondition for—rather than simply a consequence of—robust economic growth.<sup>21</sup>

---

contract enforcement, the police, and the courts, as well as the likelihood of crime and violence” *Id.* at 4. Observations run from -2.53 for Somalia to 1.96 for Switzerland, with Mexico at -0.49, India at 0.17, Italy at 0.37, and the U.S. at 1.57. *Id.* Cf. also Frederique Dahan & John Simpson, *Secured Transactions in Central and Eastern Europe: European Bank for Reconstruction and Development (EBRD) Assessment*, 36 UCC L.J. 77, 87–103 (2004) (exploring variation in the amount of a debt that can be recovered, and the time to recovery, in the courts of a sample of developing countries).

<sup>19</sup> Djankov et al., *supra* note 17, at 497. See also Istat.it, Territorial Information System on Justice, Movement of the judicial examination proceedings in first instance and main indicators of functionality at the court (absolute values and quotients). Year 2004, <http://giustiziaincifre.istat.it/Nemesis/jsp/dawinci.jsp?q=pl01-0010011000&an=2004&ig=2&ct=272&id=1A|14A> (last visited Feb. 27, 2007) (2.4 years on average required to dispose of a civil claim in Italian courts of general jurisdiction). Complaints about the speed of Italian Courts are legion. See, e.g., Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT’L L.J. 239, 282 (2004) (noting the often “slow-moving dockets” of Indian courts); Larry Coury, Note, *C’est What? Saisie! A Comparison of Patent Infringement Remedies Among the G7 Economic Nations*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1146–47 (2003) (“slow adjudication process”); Kimberly A. Moore & Francesco Parisi, *Symposium on Constructing International Intellectual Property Law: The Role of National Courts: Thinking Forum Shopping in Cyberspace*, 77 CHI.-KENT. L. REV. 1325, 1355 n.20 (2002) (“reputation for slow case resolution”).

<sup>20</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 54 (1990).

<sup>21</sup> While macro-level empirical studies provide strong evidence that credible third-party enforcement of contracts by the state enlarges the forms taken by financial intermediation, such as permitting broader use of equity as opposed to debt financing, they have not succeeded in establishing a significant causative relationship between contract enforcement and economic development in general. See, e.g., Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949 (2005). More microanalytic studies give reason to believe, however, that such a relationship exists, at least for particular types of societies in particular stages of development. For an extensive and thoughtful review of the empirical literature, see Michael Trebilcock & Jing Leng, Symposium, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1524–1580 (2006).

Important individual studies and assessments include, e.g., Kathryn Hendley et al., *Law Works in Russia: The Role of Law in Interenterprise Transactions*, in ASSESSING THE VALUE OF LAW IN TRANSITION ECONOMIES 56, 88 (Peter Murrell ed., 2001) (finding that legal enforcement mechanisms—particularly the new economic courts—add value to the Russian economy); Katharina Pistor, Martin Raiser, & Stanislaw

For parties to commercial contracts, that well-functioning judiciary might most easily be found abroad. While reform of the courts should be a top priority in any country with a weak legal system, economic development should not have to depend on the extremely slow pace with which such reform commonly proceeds.<sup>22</sup> Rather, contracting parties can be given the opportunity to meet their needs with the courts of other jurisdictions. Indeed, extraterritorial adjudication also holds substantial promise for residents of well-developed countries by expanding the range of alternatives facing litigants, encouraging specialization among judicial systems, and exposing courts in general to the stimulus of competition.

### III. The Promise of Extraterritorial Litigation

There are a variety of obstacles facing merchants who wish to use foreign courts for adjudication of purely domestic disputes. Some of these are practical, including distance, language, differences in commercial culture, and availability of legal counsel. Other obstacles are of a legal character, including the willingness of foreign courts to accept jurisdiction, the willingness of local courts to cede jurisdiction, and the ability to obtain prompt local enforcement of a foreign judgment. We will address all of these obstacles in later sections. First, however, it is important to discover the value of overcoming those obstacles. That is, what are the potential benefits of extraterritorial litigation of commercial contracts, assuming it can be made broadly

---

Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 356 (2000) (concluding that “legal effectiveness,” including contract enforcement, plays a critical role in promoting financial market development in transition economies); Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators* 23 (CESifo Working Paper Series No. 906, 2003), available at <http://ssrn.com/abstract=395403> (finding that while de jure judicial independence does not have any clear impact on economic growth, de facto judicial independence positively influences real GDP growth per capita in a sample of 57 countries); Tullio Jappelli, Marco Pagano, & Magda Bianco, *Courts and Banks: Effects of Judicial Enforcement on Credit Markets*, (Center for Stud. in Econ. & Fin., Univ. di Salerno, Working Paper No 58, 2002) (finding that improvements in judicial efficiency improve the availability of credit across Italian provinces and in a cross-country sample). Cf. also Kenneth W. Dam, *The Judiciary and Economic Development* 1 (U Chi. L. & Econ., Olin Working Paper No. 287, 2006), available at <http://ssrn.com/abstract=892030> (noting wide agreement among economists and lawyers that “the judiciary is a vital factor . . . in economic development”); Dam, *supra* note 12, at 46 (considering the “Chinese experience [to be] . . . consistent with [the] view that considerable development is possible without strong legal institutions but sustainable growth to higher per capita levels requires considerable development of legal institutions”).

<sup>22</sup> Cf. Edgardo Buscaglia & Pilar Domingo, *Impediments to Judicial Reform in Latin America*, in THE LAW AND ECONOMICS OF DEVELOPMENT (Edgardo Buscaglia et al. eds., 1997), 291, 298-309 (analyzing obstacles to judicial reform in Latin America); Fen Osler Hampson, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements between Sovereigns and Intermediate Sovereigns: Can Peacebuilding Work?*, 30 CORNELL INT’L L.J. 701, 713 (1997) (noting the “slow pace of judicial reform in El Salvador”); Anna M. Kvmik, *Recent Development: Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT’L L.J. 611, 616 (1993) (describing judicial reform in Ukraine as “difficult”); Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J.L. REFORM 641, 644 (2002) (calling judicial reform in Russia “agonizingly slow”); Michael Knox, Comment, *Continuing Evolution of the Costa Rican Judiciary*, 32 CAL. W. INT’L L.J. 133, 141 (2001) (noting political obstacles to judicial reform).

accessible? We focus here on the advantages, and turn to difficulties in the section that follows.

To ease exposition, it will be helpful to introduce here a bit of terminology. When two merchants from the same state have their dispute heard in the courts of a different state, we will refer to the first state as the “origin” state and the second state—the forum state—as the “host” state.

### A. Giving Litigants Access to Better Courts

The first and most direct benefit is familiar and is frequently mentioned as an argument for allowing choice of forum clauses: Litigants from jurisdictions with low-quality courts will be given access to better courts to resolve their disputes.<sup>23</sup> Important as this is, however, it is not the most important benefit. For the advantages of access to better courts extend well beyond those gained by persons who actually go to court.

### B. An Improved Contracting Environment

The more fundamental advantage of access to better courts is that, as emphasized above, more effective enforcement of contracts makes all contractual relationships more dependable, including the overwhelming majority that will never go to court. Consequently, rapid and principled enforcement of contracts can transform commercial relationships in general, with broad benefits for the efficiency of economic activity.<sup>24</sup>

---

<sup>23</sup> The benefit of being able to choose the most suitable court is frequently mentioned as an advantage of forum selection clauses. *E.g.*, Rochelle C. Dreyfuss, *The Sixth Abraham L. Pomerantz Lecture: Article: Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOKLYN L. REV. 1, 37 (1995); Celia R. Taylor, *Comment: National Iranian Oil Co. v. Ashland Oil, Inc.: All Dressed Up and Nowhere to Arbitrate*, 63 N.Y.U.L. Rev. 1142, 1146 (1988).

<sup>24</sup> Effective enforcement of contracts may even have a broad beneficial effect on corporate ownership and control. Ronald Gilson has recently argued that the strong prevalence of family-owned firms in developing countries may owe as much or more to weak contract law as to weak shareholder protection in corporate law. Ronald Gilson, *Controlling Family Shareholders in Developing Countries: Anchoring Relational Exchange*, 60 STAN. L. REV. 633 (2007). Absent effective legal enforcement of contracts, “substitutes for law . . . as a means to assure that parties perform their contractual obligations.” *Id.* at 636. Thus, “establishing and sustaining a reputation by performing . . . obligations to trading partners” must be seen as an investment in the firm’s reputation that “will pay off over the corporation’s infinite life.” *Id.* at 641. However, that investment “will not be made unless it is also to the advantage of the short-lived individuals who actually make the corporation’s decisions.” *Id.* Family ownership is a way of solving this problem: Because of intrafamily inheritance and family ties, the current generation of decision makers . . . treats the next generation’s utility as the equivalent of their own, so there is no temporal distortion of incentives to invest in reputation.” *Id.* at 643. Apart from its explanatory power regarding corporate ownership structures, Gilson’s thesis also has an important implication for the value of an efficient contracting environment. With better contractual enforcement available, corporations need no longer rely upon family ownership to bond their contracts, allowing more diverse, efficient, and equitable patterns of ownership to emerge.

## C. Improvements in Judicial Systems

Beyond giving global access to the world's most effective judicial systems, broad access to extensive extraterritorial litigation should lead to improvement in those judicial systems themselves, and to the law they administer.

### 1. Competition

In effect, we are proposing a global market for judicial services in contract litigation. The result, as with competition in general, should be a stimulus to improve the quality of judicial services offered.<sup>25</sup> While many jurisdictions would be too inflexible or preoccupied to make active efforts to attract foreign litigants, some are bound to take a more entrepreneurial approach—an issue we return to below.<sup>26</sup> And at least to some extent, the resulting competition for litigants would be a race for quality, given that some of the qualities that are likely to attract foreign litigants, such as speedy decisions and highly qualified judges, are unequivocally positive.<sup>27</sup>

### 2. Comparing Systems

The advantage of freer choice of forum for commercial litigation lies not just in a stimulus for improvement in quality and efficiency generally, but also in the opportunity for more effective comparison between different approaches to adjudication.

For example, it is not completely clear to what extent jury-based systems are superior to non-jury-based systems. The success in corporate law of the Delaware Chancery Court, which is a court of equity<sup>28</sup> and therefore sits without a jury,<sup>29</sup> suggests one answer.<sup>30</sup> A large sample of commercial contracts studied by Eisenberg and Miller, in which only 20% waive jury trial, suggests another.<sup>31</sup>

Similarly, scholars disagree vigorously as to whether or not a system that gives judges broad responsibility in discovering the facts, as in civil law countries, is

---

<sup>25</sup> Cf. also Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as a Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1391 (2004) (noting, in passing, that permitting alternative forums increases competition among the states).

<sup>26</sup> See *infra* Part IX.

<sup>27</sup> There is an unavoidable comparison here to regulatory competition in corporate law, which we address *infra* Part IV.D.

<sup>28</sup> Del. Code Ann. tit. 10, § 341 (2007).

<sup>29</sup> Del. Const. art IV § 10.

<sup>30</sup> Indeed, it has long been argued that the absence of a jury is part of what makes the Chancery Court attractive to litigants. E.g., Jill E. Fisch, *Thirteenth Annual Corporation Law Symposium: Contemporary Issues in the Law of Business Organizations: The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077 (2000); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002) [hereinafter Kahan & Kamar, *Myth*]; Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1212 (2001) [hereinafter Kahan & Kamar, *Discrimination*]; Stephen J. Massey, *Chancellor Allen's Jurisprudence: Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 704 (1992).

<sup>31</sup> Theodore Eisenberg & Geoffrey Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts* 16 (Cornell Law School research paper No. 06-044, 2006) (examining a sample of 2,816 contracts filed with the SEC as exhibits in Form 8-K filings).

superior to the U.S. system, where that task is largely left to the attorneys.<sup>32</sup> Likewise, persons may reasonably differ about the degree of formalism that is optimal in civil proceedings. Nor is there clear evidence concerning the value of appeals. Should the parties always have the right to appeal the decision? And should the decision of the court of appeal be subject to an appeal as well?

If litigants have broad choice among courts in differing legal systems, it will become far easier to make comparisons between differing approaches to these issues and others, and to discover which work best in given circumstances. That information can then be used, not just by litigants in their choice of courts, but by lawmakers in reforming their judicial systems.

### 3. *Specialization*

To provide high-quality services, it is an advantage for judges to be familiar with the area of the law that they are applying and with the business context in which the case is situated. Delaware's Chancery Court has become the go-to forum for cases involving publicly-traded corporations,<sup>33</sup> and there is a broad consensus in the literature that an important part of the Chancery Court's attractiveness is due to its specialization on corporate law cases.<sup>34</sup> These cases make up about three quarters of its case load,<sup>35</sup> thereby allowing its judges to gain particular expertise in that area of the law.<sup>36</sup> The advantages of such specialization have now stimulated a number of U.S. states—including prominently New York, of which we will say more later<sup>37</sup>—to adopt specialized courts to handle commercial litigation. A global “market” for judicial services promises substantially increased potential for specialization of this sort, with courts either in the same or different jurisdictions specializing not just in contractual disputes, but in particular types of contracts.<sup>38</sup>

---

<sup>32</sup> Compare John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (invoking the German experience as an argument in favor of restricting the parties' role in fact-gathering) with Ronald J. Allen et al., *Legal Institution: The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U.L. REV. 705, 716-735 (1988) (advancing various counterarguments).

<sup>33</sup> Cf. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 881 (calling the Chancery Court “the most prominent corporate law court”); Massey, *supra* note 30, at 705 (pointing to the Chancery court's “prominence as a forum for the adjudication of corporate law issues”).

<sup>34</sup> See, e.g., Dreyfuss, *supra* note 23, at 4; Kahan & Kamar, *Myth*, *supra* note 30, at 708; Fisch, *supra* note 30, at 1077.

<sup>35</sup> See, e.g., Fisch, *supra* note 30, at 1077-78; Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 903 (1990). Cf. also Kahan & Kamar, *Discrimination*, *supra* note 30, at 1212 (noting that the Chancery Court's docket “consists mostly of corporate claims”).

<sup>36</sup> See, e.g., Kahan & Kamar, *Myth*, *supra* note 30, at 708; Fisch, *supra* note 30, at 1077-78; Kahan & Kamar, *Discrimination*, *supra* note 30, at 1212.

<sup>37</sup> See *infra* Part VIII.A. (describing New York's role as a leading forum for commercial litigation within the United States).

<sup>38</sup> The Eisenberg & Miller analysis of choice of forum in a sample of commercial contracts, discussed *infra*, Part VIII.A., in fact shows substantial variance in choice of law across different types of contracts. See Theodore Eisenberg & Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, p. 20 tbl. 3, working paper,

Moreover, specialization promises not just greater experience and expertise among judges in applying the law, but greater refinement of the law itself through the greater volume and variety of cases that are brought to the jurisdiction.

#### **4. Courts in States of Origin**

Beneficial changes in judicial services, of the types just noted, should appear with particular prominence in potential host states. They should appear in origin states as well, which will lose their captive hold on litigants and, through migration of litigation overseas, have graphic evidence of their weaknesses. But broader choice of forum may also have some deleterious effects on origin state courts and law, making the overall consequences for origin state judicial services more ambiguous. We turn to this and other problems next.

### **IV. Potential Problems**

Extraterritorial litigation promises not just benefits but also some potential problems. These largely take two forms. First, the chosen forum may end up being worse for the parties than the forum that would have been selected in the absence of a global market for judicial services. Second, the parties' choice, while advantageous for the parties themselves, may produce negative externalities, or may fail to produce positive externalities that would otherwise have resulted.

#### **A. Informational Asymmetries**

It is possible that broad choice among competing systems of courts might induce contracting parties to choose a court that is less beneficial to them than the court that would otherwise have heard their case. The principal reasons lie in informational problems.

##### **1. Taking Advantage of Uninformed Parties**

We are concerned here only with situations in which both parties to a dispute have consented to have their dispute heard by a foreign court, either in their contract or after their dispute arose. This restriction removes the most serious problems of plaintiff's forum shopping that can arise when parties are given a choice of forum. It does not, however, eliminate all such problems.

Even where the forum is chosen by contract, the parties may end up picking a suboptimal forum if one of the parties is much better informed about the relevant facts than is the other. The general problem is familiar, and is not limited to choice of forum clauses. Consumers, for example, commonly do not understand, or even read, the terms in standard form contracts, including particularly esoteric terms such as

---

3/18/2007 (on file with authors) [hereinafter Eisenberg & Miller, *Flight to New York*] (showing what percentage of different types of contracts choose Delaware law, New York law, California law, or some other state law). While those authors do not report directly on the matter, the contracts they survey presumably show similar variance in choice of *forum*, since choice of forum generally tracks choice of law in their sample. *Id.* at 34 tbl.12 (showing how choice of forum correlates with choice of law).

choice of forum clauses.<sup>39</sup> The result is a so-called market for lemons.<sup>40</sup> Consumers are unable to distinguish between fair and unfair standard form contracts, and are therefore unable to reward sellers for including fair rather than unfair terms. Consequently, sellers have the incentive and the opportunity to put exploitative terms in their contracts.<sup>41</sup>

This problem can be managed with respect to choice of forum clauses using the same techniques employed for standard form contract terms in general. One approach is to prohibit the use of certain terms across the board; another is to use a balancing test, focusing on the specific circumstances of the case. With respect to forum selection clauses, both approaches are already being used. German law, for example, contains a near complete ban on forum selection clauses in consumer contracts,<sup>42</sup> while most U.S. jurisdictions take a case by case approach and look at the reasonableness of the forum selection clause.<sup>43</sup> In any case, these concerns do not justify rejecting the judicial market as a whole, but only the adoption of specific protection for consumers and other parties—such as employees, and perhaps franchisees—who might be similarly affected by informational disadvantages. We effectively assume a relatively simple and restrictive approach in our discussion here—permitting free contractual choice of forum only when both parties are merchants—but more nuanced approaches can clearly be taken, particularly as experience increases.

## 2. *Lawyer-Client Agency Problems*

Another potential problem results from opportunism in the lawyer-client relationship. For several reasons, lawyers might recommend a choice of forum that is less than optimal for the client.

To begin with, the number of jurisdictions where the lawyer is admitted to the bar, and with whose law she is familiar, is usually limited. Hence, she may recommend a particular jurisdiction, not because of the efficiency of that jurisdiction's judiciary, but because the lawyer is well-acquainted with the relevant procedural rules and is admitted to the local bar. Second, rules governing lawyer's fees may distort choices. Some jurisdictions have much more liberal fee rules than

---

<sup>39</sup> See Lee Goldman, *Public Policy: My Way or the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U.L. REV. 700, 716–17 (1992).

<sup>40</sup> See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–90 (1970) (illustrating the problem of adverse selection by reference to a used car market).

<sup>41</sup> Cf. Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 586–87 (2006) (describing how a market for lemons can result where consumers have imperfect information about the content of standard form contracts).

<sup>42</sup> See Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 12, 2005, Bundesgesetzblatt [BGBl.] 3202, as amended, § 38 ZPO (imposing a general ban on forum selection clauses in contracts with nonmerchants with only a few narrowly drawn exception, e.g. where neither party has a place of general jurisdiction in Germany).

<sup>43</sup> See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593–594 (1991) (holding, in an admiralty case, that forum selection clauses, even where included in a consumer contract, are not generally invalid but subject to judicial scrutiny for fairness); *Caspi v. Microsoft Network*, 732 A.2d 528, 531 (N.J. Super. 1999) (holding that inclusion in a consumer contract does not make forum selection clause invalid).

others. For example, some countries, such as the United States, allow contingent fees, while others do not.<sup>44</sup> Hence, law firms may be tempted to shepherd their clients towards jurisdictions with more generous rules on lawyer's fees. Finally, it is not clear that lawyers have a preference for efficient legal proceedings. For example, lawyers paid on an hourly basis may prefer complex proceedings with numerous hearings.

However, these problems are unlikely to be serious. A lawyer's decision to litigate the case in a foreign jurisdiction will usually be scrutinized more diligently by the client than the decision to litigate locally. Moreover, as a general matter, the quality of courts is unlikely to be overly case-specific. That means that it will not take much specialized knowledge for the client to monitor his attorney when it comes to choice of forum decisions. And this should be true even if, as seems both likely and desirable, particular jurisdictions specialize in certain areas of the law, as Delaware has done with corporations and New York has done with contracts.<sup>45</sup> The number of jurisdictions that are deemed to offer attractive courts for foreign litigants is likely to be limited, and there will probably develop a general understanding in the marketplace as to which courts are most effective.

## B. Negative Externalities

The use of foreign courts to adjudicate domestic disputes also has the potential to create negative externalities—deleterious consequences for persons beyond the parties to the contract involved—and to reduce positive externalities that otherwise would have been realized.

### 1. *Less Refinement of Origin State's Law*

Litigation can yield positive externalities of two types. First, it can produce benefits for the substantive law of the state whose law is applied, principally through the refinement of precedent.<sup>46</sup> Second, it can produce benefits for the court system where the litigation takes place by permitting judges to hone their skills<sup>47</sup>.

---

<sup>44</sup> Under German law, contingent fee arrangements are void. *See, e.g.*, Bundesgerichtshof, 12/4/1996, 40 NJW [Neue Juristische Wochenschrift] 3203, 3204 (1987); Bundesgerichtshof, 2/28/1963, 16 NJW [Neue Juristische Wochenschrift] 1147, 1147 (1963); Bundesgerichtshof, 6/19/1980, 33 NJW [Neue Juristische Wochenschrift] 2407, 2408 (1980). French law is somewhat more generous, allowing agreements under which the lawyer is entitled to a supplemental fee if he wins the case. *See* Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 501 (2004). U.K. law also provides a limited degree of flexibility by allowing arrangements under which a lawyer who wins the case can double the fee that she would otherwise have been entitled too. *See id.*

<sup>45</sup> *See infra* Part VI.A.

<sup>46</sup> *E.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979) (noting the creation of precedents as a positive externality of adjudication). Empirically, it has been shown that precedents matter to the outcome of legal proceedings. *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U.L. REV. 1156, 1205 (2005) (concluding that "that precedent has some constraining effect on judicial decisions").

<sup>47</sup> *Cf.* Massey, *supra* note 30, at 704-05 (noting that the Delaware Chancery Court's focus on corporate law cases has allowed the Court to "acquire a greater expertise in matters of corporate law than judges on courts with greater diversity of jurisdiction").



Extraterritorial litigation shifts those external benefits—at least in the first instance—from origin states to host states, threatening to further weaken the legal systems of the origin states.

The problems involved concern both efficiency and distribution. We turn first to the problem of efficiency: from a global point of view, are the external benefits conferred on host jurisdictions and their litigants likely to be greater than any negative externalities suffered by origin states? There are good reasons to believe that the answer is yes, though the issue is complicated and cannot be resolved on a purely a priori basis. The issues involve the production of precedent, the production of judicial expertise, and the production of political pressure to improve the courts.

#### **a. Precedent**

With respect to production of precedent, consider first a case for which clear precedent is lacking both in the origin state and in the (potential) foreign host state. In this situation, beneficial externalities will frequently be greater if the case is tried in the host state. First, the host state will often be chosen because its courts are particularly competent. Consequently, the quality of the resulting case law will be particularly high. Second, the parties will typically choose not just the courts but also the substantive law of the host state.<sup>48</sup> Given that litigants from many jurisdictions will end up choosing the same law—namely that of the most popular host state—the resulting case law will benefit a particularly large number of economic actors.<sup>49</sup> Third, a precedent produced within the host state’s law is also available to serve as a guide to origin state courts in addressing similar issues under the origin state’s own law—just as courts from other U.S. states often follow the lead of Delaware’s judiciary when faced with issues of corporate law.<sup>50</sup>

Now consider a case for which clear precedent exists in the (potential) host state but not in the origin state. If the case is governed by host state law, it will likely be settled rather than litigated. If instead the case is governed by origin state law, the resulting uncertainty may result in litigation. That will involve extra expense for the parties immediately involved, but may also produce precedent that is valuable to others who are constrained to use origin state rather than host state law and courts (for example, because they are not merchants). The result is akin to the exit/voice tradeoff

---

<sup>48</sup> In their empirical analysis of commercial contracts, Eisenberg and Miller find that choice of forum and choice of law are strongly correlated. See Eisenberg & Miller, *Flight to New York*, *supra* note 89, at 34 tbl.12.

<sup>49</sup> An example from corporate law may illustrate this point: More than half of all publicly traded corporations are incorporated in Delaware. DEL. DIV. OF CORPORATIONS, *Why Choose Delaware As Your Corporate Home?*, Homepage, at <http://www.state.de.us/corp/> (last visited Nov. 21, 2007). Accordingly, the number of publicly traded corporations profiting from Delaware precedents is also particularly high. Similarly, at least within the United States, New York has emerged as the leading law for commercial contracts. See *infra* Part VIII.A. Consequently, case law produced by New York courts in the area of commercial law will benefit particularly many merchants.

<sup>50</sup> Cf. Demetrios G. Kaouris, Note, *Is Delaware Still a Haven for Incorporation*, 20 DEL. J. CORP. L. 965, 1004 (1995) (“Courts [in other states] can elect to follow Delaware precedents, and have often done so.”).

discussed below.<sup>51</sup> To the extent that host state precedents can serve as a guide to origin state courts, the tradeoff goes in favor of having the case governed by host state law and courts. But host state case law may not always be suited to serve a strong precedent-like function in the origin state legal system owing to the differing legal cultures in which they are rooted. And, even where they might serve that function well, host state precedents, by virtue of their foreignness, may have too little salience for judges, lawyers, and individual economic actors in the origin state to guide their actions as clearly as would origin state precedents.

In sum, while there are good reasons to believe that the positive externalities of adjudication will tend to be greater in case of extraterritorial litigation, this does not necessarily have to be the case.

## **b. Judicial Expertise**

Similar considerations apply to the development of judicial expertise.

As a general matter, there is reason to believe that the positive externalities in the form of judicial expertise will be particularly great in case the parties opt for extraterritorial litigation: A host state judge who is specialized in commercial contractual disputes may gain useful expertise at the margin from hearing a case involving novel law or facts—expertise that can be applied in related cases as they come before her. In contrast, a generalist judge in an origin state where such cases are rare may never hear another case like it.

But again, one can also come up with scenarios where extraterritorial litigation reduces rather than increases the positive externalities in form of judicial specialization. For example, the number of homegrown commercial cases decided in New York may be so great that New York's commercial division judges can develop most of the benefits associated with specialization even in the absence of foreign litigants. The ability of judges in origin states to specialize, by contrast, may suffer if a sizable percentage of litigants opt to litigate in New York, thereby preventing origin state courts from getting a critical mass of commercial cases.

## **c. Redistribution**

Setting aside the question of whether extraterritorial litigation will increase or decrease the positive externalities of judging in aggregate, there is also the question of redistribution. Can one expect extraterritorial litigation to be necessarily accompanied by an undesirable redistribution of wealth from (relatively poor) origin states to (relatively rich) host states? Quite likely not. Commercial actors in origin states—whether they litigate or simply contract in the shadow of contract law—should benefit substantially from the availability of host state law and courts. And origin states may be able to save on some of the expenses of operating their judicial system—though the amounts involved seem likely to be small. A judgment about likely distributional effects, however, also requires further consideration of the

---

<sup>51</sup> See *infra* Part IV.B.2.

welfare of origin state residents who cannot avail themselves of the law and courts of foreign host states; we turn to that next.

## 2. *Weakening Voice by Exit*

As Albert Hirschman famously observed, competition for local services, including particularly public services, can weaken incentives for consumers to press for the local providers to improve the services they offer.<sup>52</sup> This could happen with courts. If prominent merchants who would otherwise have a stake in the quality of a country's courts are given the opportunity of simply taking their litigation elsewhere, the result may be to remove much of the political pressure for reforming the local courts. Consequently, the quality of adjudication might not only fail to improve, but might even decline, for those types of cases that cannot be litigated in foreign forums.<sup>53</sup> In tort cases, for example, the parties often lack a prior contractual relationship and hence cannot select a foreign forum *ex ante*, and will often have difficulty reaching an agreement regarding the forum *ex post*. Moreover, even in some contracts cases—namely where, as in consumer contracts, strong informational asymmetries are to be expected—the law is well advised not to allow the free use of forum selection clauses.<sup>54</sup>

This tradeoff between “exit” and “voice” must be taken seriously. It is very difficult, however, to judge *a priori* how serious a problem it might be, or whether it will in fact be a problem at all. The reverse could also happen: once a sufficient number of local merchants become familiar with high quality foreign judicial services in their commercial affairs, they may become far less politically tolerant of the low quality of their domestic courts in general.

There is a Catch-22 here. The argument is that a state should prevent its citizens from litigating their commercial disputes in the foreign courts of other countries for the sake of creating sufficient political dissatisfaction to force reform of domestic courts. But a government that reacts to the low quality of its courts not by improving them, but by granting them a legally-imposed monopoly, shows its disinclination to undertake reforms in response to acknowledged problems.

Courts are not infant industries that need protection to mature. On the contrary, in most countries they are well established. The problem, in fact, is that they are *too*

---

<sup>52</sup> ALBERT HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

<sup>53</sup> A similar criticism has been raised against so-called bilateral investment treaties (BITs). Such treaties often provide foreign investors with a number of legal guarantees that are to protect them against opportunism on the part of the home state. For example, BITs often provide that foreign investors will be able to resolve contractual disputes with the host states through international commercial arbitration. Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World* 1–2 (Draft Mar. 23, 2004), <http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf>.

According to Daniels, BITs have “have systematically subverted the evolution of robust rule of law institutions in the developing world.” *Id.* at 2. “This subversion,” he argues, “is the result of a complex dynamic in which foreign investors rationally refrain from championing good and generalized rule of law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.” *Id.*

<sup>54</sup> *Cf. infra* Part IV.A.1 (addressing the problem of informational asymmetries).

well established, and resistant to reform. Further extending their monopoly on adjudication consequently seems a weak source of stimulus to their improvement.

### 3. *Burdening Witnesses*

Another concern involves the interests of witnesses who are, perhaps against their will, involved in litigation. Witnesses stand to lose time and effort from participation in a trial, and may have to reveal information that they would rather have kept secret for personal or business reasons. With global access to judicial services, the parties, in choosing a forum, the magnitude of these costs may grow. For example, the parties may choose a forum that does not ensure that witnesses are adequately reimbursed for their efforts, or that is overly aggressive in forcing the witnesses to disclose confidential information.

At present, this problem is largely theoretical, because courts do not have the capacity to force witnesses in other jurisdictions to cooperate.<sup>55</sup> To facilitate the emergence of a market for judicial services, however, it is desirable to increase (by treaty or convention) courts' ability to enforce the cooperation of witnesses located in other jurisdictions. Yet there are means of assuring that such rules do not place additional burdens on witnesses. One is to require that the burden imposed on witnesses not exceed the burden imposed by the law of the state where the witness is located. For example, if, in a given case, the parties and the witnesses are located in Switzerland, but the parties decide to litigate in London, then, under the rule suggested, the London court could not burden the witness beyond what Swiss law would have allowed. In this way, increased externalities can be largely avoided.

### C. *Sovereignty, Dignity, and Protectionism*

Litigation of domestic disputes in foreign courts is sometimes said to be inconsistent with the "sovereignty" of the state of origin.<sup>56</sup> The principled concern

---

<sup>55</sup> That is true, first, for the United States. See Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 39 (1989) (noting that states uniformly refuse to exercise extraterritorial subpoena power). The same is true internationally. The relevant rules can be found in The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. See generally Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 550–556 (2006) (summarizing the provisions of the Hague Convention); Andrea Schulz, *The Hague Convention of Choice-of-Court Agreements: Strengthening Compliance with International Commercial Agreements and Ex-ante Dispute Resolution Clauses?: The 2005 Hague Convention of Choice of Court Clauses*, 12 ILSA J. INT'L & COMP. L. 433, 435–41 (2006) (summarizing the provisions of the Hague Convention).

<sup>56</sup> Cf. Linda Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 303 (1998) (stressing that choice of forum has implications for sovereignty, since "[t]he notion of forum access, regulated by subject matter jurisdiction, is a fundamental governmental attribute intricately tied to the power and authority of the state"). Cf. also William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 200 (1995) (noting, implicitly, that a statute allowing choice of court clauses would mean a further erosion of the sovereignty of national courts). With respect to substantive corporate law, a similar argument has been made. See Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 101, 101 (2004) ("Even if Delaware's dominance is a race to the top resulting in a corporate law framework that efficiently serves the interests of shareholders, it is still illegitimate.").

reflected in such statements is that the government of the origin state will lose some of its ability to govern the affairs of its citizens. Since our focus here is on commercial contracts, the states for which this concern should be most substantial are those that are not prepared to embrace freedom of contract even among merchants. For such states—now much fewer in number, with the general collapse of state socialism as a sociopolitical ideal—general freedom to litigate domestic contract disputes in foreign courts under foreign law must necessarily remain unattractive. An alternative for such a state would be to permit its citizens to litigate domestic disputes in foreign courts, but to require that their affairs be governed by the origin state's own substantive contract law. This is, however, a distinctly second best approach in any area of law, and in a field such as contract law—where canons of interpretation are a critical element in adjudication—it is particularly unsatisfactory. States unwilling to give contracting parties a choice of law are, then, unlikely participants in a regime of extraterritorial litigation.

Expressions of concern about sovereignty may also reflect issues that are dignitary rather than substantive. Even if there is no meaningful difference in the substantive law involved, when a state's citizens choose a foreign court over a domestic court, that choice is easily interpreted as a slight on the quality of the origin state's ability to govern its own affairs. This perhaps explains why, as we explore below,<sup>57</sup> most nations of the world recognized half a century ago the validity of decisions by private arbitrators in international commercial disputes involving their citizens, but have yet to grant similar recognition to the validity of judgments by foreign public courts in the same class of disputes. It is hard to explain this contrast on substantive grounds: displacing local courts by private arbitrators located abroad seemingly involves greater loss of control than would result from displacing local courts by the public courts of other states. But, at a dignitary level, things could be just the reverse. It is one thing for the French government to recognize that its citizens might prefer to have their commercial disputes handled by private arbitrators in London than by the French public courts; it is another thing to recognize that French citizens might prefer the English public courts to the French public courts. The latter looks more like conceding that English government might be superior to French.

On top of such dignitary concerns, objections to loss of sovereignty may also serve as a stand-in for the protection of narrower interests. Origin state judges, in particular, may fear that the availability of extraterritorial litigation will bring personal loss of power and status (and, for those that are corrupt, substantial income as well). And established local lawyers may fear loss of business to foreign lawyers or to local lawyers familiar with the law of host states.

Such threats to dignity and established interests are real, and should not be ignored in the calculus of advantages and disadvantages of a more liberal regime of extraterritorial litigation. However, as the regular public outcry over the off-shoring of industries and the closing of national champions demonstrates, similar costs are involved in letting local citizens obtain any good or service from foreign suppliers.

---

<sup>57</sup> See *infra* Part VI.B.

And, as with other goods and services, the gains to the local consumers—which here potentially include most merchants, and in turn their customers—seem very likely to swamp the losses. Of course, we are not blind to the fact that adjudication, as a judicial service, is of a specifically governmental nature in a way that most other products are not. Rather, we wish to stress that in the specific dimensions at issue here—the prospect of losing business to other countries and the damage to national self-esteem—judicial services are not fundamentally different from other highly visible products.

#### D. Extraterritorial Litigation in Other Fields of Law

The field in which access to foreign courts has previously gained the most attention is, of course, not contract law but corporate law.

In the U.S., basic corporation law is state law,<sup>58</sup> and choice of law doctrine permits a corporation to be formed under the corporation law of any state, whether or not the corporation has shareholders, employees, assets, or places of business in that state.<sup>59</sup> Recent decisions of the Court of Justice of the European Communities have extended this liberal choice of law doctrine as well to Europe,<sup>60</sup> where previously a number of states had required a company to incorporate in the state of the company's principal place of business.<sup>61</sup>

The desirability of allowing corporations to choose the applicable corporate law has long been the subject of debate. The argument in favor of it parallels that offered here for permitting contractual relations to be governed by foreign law and foreign courts.<sup>62</sup> The contrary argument stresses the agency conflict between managers and shareholders and reasons that corporations will end up in jurisdictions that benefit the former at the expense of the latter.<sup>63</sup>

---

<sup>58</sup> See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 553 (2002) (noting that “[i]n the United States, most corporate law issues are left for state law”),

<sup>59</sup> See, e.g., *id.* (pointing out that “corporations are free to choose where to incorporate and thus which state's corporate law system will govern their affairs”).

<sup>60</sup> The relevant cases are Case 212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, [1999] 2 C.M.L.R. 551 (1999); Case 208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC)*, 2002 E.C.R. I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, 2003 E.C.R. I-10155. For an analysis of these cases and their importance to the freedom to choose the applicable corporate law see Dammann, *supra* note 44, at 484–86; Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 173–83 (2004).

<sup>61</sup> See Dammann, *supra* note 44, at 479 n.9 (listing Member States that used to apply the law of the jurisdiction where the corporation's “real seat” was located rather than the law of the state of incorporation).

<sup>62</sup> Cf., e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 16 (1993) [hereinafter ROMANO, GENIUS] (asserting that state competition “benefits rather than harms shareholders”); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 847 (“While state competition is an imperfect public policy instrument, on balance it benefits investors.”).

<sup>63</sup> E.g., Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1199 (1999) (“There are strong theoretical reasons to

While there is good reason to believe that, on balance, shareholders benefit if corporations are allowed to choose,<sup>64</sup> one need not accept that judgment to conclude that broad access to extraterritorial litigation for commercial contracts is desirable. In the context of commercial contract, there simply is no agency conflict comparable to that between managers and shareholders. Moreover, unlike in corporate law, where managers sometimes succeed in obtaining shareholder approval for decisions that benefit the managers at the shareholders' expense,<sup>65</sup> parties to commercial contracts do not run the risk that the initially agreed upon selection of a forum will later be changed to their detriment. Consequently, the argument for limits on the ability of (some of) the parties to a corporation to choose and change the law and courts by which they will be governed is weaker than in the case of commercial contracts.

Interestingly, outside of corporate law, the areas of law in which proposals for extraterritorial litigation have drawn the most conspicuous attention involve torts<sup>66</sup> and crime.<sup>67</sup> Those fields are, however, clearly far less suitable than contracts for use of a foreign forum, much less for application of foreign law. The reason, of course, is that torts and crimes involve situations in which the persons involved generally cannot adjust their relationships privately before their litigation-inducing conflict arises. The expectations that govern their relationship must therefore be established by a social contract, not a private one. It is generally the role of governments to set the terms of this social contract, and of choice of law doctrine to determine which government's law and courts will govern. If parties to a conflict can, individually or together, change that determination, the ability to establish clear expectations will be diminished for all. While litigation in foreign courts may sometimes be appropriate in

---

expect that state competition will work to produce a body of corporate law that excessively protects incumbent managers. The development of state take over law, we have argued, is consistent with this view.”); Lucian A. Bebchuk, *Response to Increasing Shareholder Power: Reply: Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1812 (2006) (“Overall, there is a strong basis for concluding that state law has been and continues to be distorted in management's favor.”).

<sup>64</sup> As regards the United States see the sources cited *supra* note 62. With respect to the situation in Europe see, e.g., Dammann, *supra* note 44, at 542 (arguing that “free choice is . . . [a] desirable policy choice for the European Community”).

<sup>65</sup> See, e.g., Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 862–65 (2005) (describing ways in which directors can obtain the consent of shareholders to charter amendments that benefit directors at the expense of shareholders).

<sup>66</sup> Cf. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832 (2006) (noting that litigation under the Alien Tort Statute has included “suits by aliens against other aliens for torts committed abroad without any apparent connection to the United States”); Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2123–2155 (1995) (analyzing the question to what extent federal courts have jurisdiction over torts committed outside U.S. territory).

<sup>67</sup> See, e.g., Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1064–1134 (2004) (explaining how the prosecution of criminal acts committed in another country can be reconciled with the principle of democracy); Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 193–226 (1997) (analyzing the extent to which violations against human rights law that occurred outside the United States can be prosecuted under domestic U.S. criminal law); Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2272–2291 (1997) (arguing that countries have universal jurisdiction to prosecute genocide).

other fields, today it is only for commercial contracts that the case for making that option generally available is strong.

Viewed broadly, for any nation seeking to develop a market economy, the costs of facilitating merchants' access to extraterritorial litigation seem quite modest in comparison with the potential benefits. Indeed, the difficult issue is not whether it is a good idea, but rather how it can be made to work

## **V. Practical Obstacles**

Whatever its attractions in principle, extraterritorial litigation might seem to face serious practical obstacles. There is reason to believe, however, that these obstacles are more apparent than real.

### **A. Distance**

First, there is the inconvenience of having to litigate in a forum that is geographically distant. Especially for lawsuits where the stakes are small, travel to a foreign court will often be impractical. But, as we have already observed, there is every reason to believe that this obstacle can soon be eliminated in large part through the use of videoconferencing. While it may be some time, if ever, before that technology is a perfect substitute for appearance in person, its deficiencies are soon likely to have reduced to the point where they are far smaller than the burdens of litigating in weak local courts.

### **B. Language**

It is obviously burdensome to litigate in a foreign language. This said, language barriers are unlikely to prevent a sharp increase in extraterritorial litigation. Many nations share a common language. English, French, and Spanish, in particular, are each spoken in many countries around the globe. Our hypothetical merchants in Bangalore, for example, would have no trouble communicating with a judge in London or New York. Even the Italians might escape the weaknesses of their courts by crossing the border to the Italian-speaking courts of southern Switzerland. Moreover, once extraterritorial litigation becomes well established, leading jurisdictions could easily offer adjudication in other languages. There are already many Spanish-speaking judges in the U.S., for instance, and it should not be difficult to find many more who speak Chinese or Russian.

### **C. Different Legal and Commercial Cultures**

When parties litigate in a foreign court, there are several obvious alternatives for the choice of substantive law: the law of the origin state, the law of the host state, a supra-national body of law such as the Convention on Contracts for the International Sale of Goods (CISG),<sup>68</sup> Or the—nonbinding—Unidroit Principles of International

---

<sup>68</sup> Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668.



Commercial Contracts.<sup>69</sup> The conspicuous economies of scale and scope in adjudication discussed above, as well as current patterns of litigation<sup>70</sup>, suggest that the first of these (the law of the origin state) will be least favored and that the second (the law of the host state) will be most favored.

Will our hypothetical merchants in Bangalore then face unmanageable burdens in learning English law, and adjusting their commercial practices to that law, if they want to have their disputes governed by English courts? Quite likely not. First, many countries—and particularly those that share a common language—share a common legal tradition. Consequently, the relevant differences in commercial law are relatively modest. Second, only one, or at most a very few, jurisdictions are likely to emerge as important loci for extraterritorial contract litigation in any given language, just as Delaware has emerged as the single locus for corporate law and litigation in the U.S. and London has become the worldwide locus for admiralty disputes<sup>71</sup>. And, just as lawyers from all U.S. states (and an increasing number of other nations) have come to be familiar with Delaware law as a consequence, likewise lawyers and their clients in any given origin state can be expected to develop expertise in the law of the dominant host state for contract law. Third, some contracts will be governed by uniform law, such as the Convention on Contracts for the International Sale of Goods (CISG).<sup>72</sup> Accordingly, the courts of the host state will be just as expert as the courts of the state of origin when it comes to issues of substantive law. Fourth, most contracts cases turn less on intricate questions of substantive law than on factual issues and matters of contract interpretation. And fifth, commercial law, driven by the needs of expanding global commerce, is becoming increasingly homogeneous around the world, rendering cross-country differences in commercial law ever less salient.

#### D. Availability of Legal Counsel

Extraterritorial litigation requires access to lawyers who can advise on the law of the host state at the time of contract formation, as well as access to lawyers who can litigate, in the courts of the host state, disputes that cannot otherwise be resolved. It is likely to be most efficient if those lawyers are principally located in the origin state, close to the parties they serve. One reason is that many of the legal relationships that a firm enters into—such as the contracts with its employees and local suppliers—will

---

<sup>69</sup> Unidroit Principles of International Commercial Contracts 2004, available at <http://www.unidroit.org/english/principles/contracts/main.htm>. On the role of these principles see, e.g., Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 16-26 (2008) (explaining the relevance of the Unidroit Principles); Alec Stone Sweet, *The New Lex Mercatoria and transnational Governance*, 13 J. EUR. PUBL. POL'Y 627, 633 (noting that the Unidroit Principles purport to be a comprehensive code for international commerce).

<sup>70</sup> See *infra* Part VIIIA.

<sup>71</sup> Fred Konynenburg, Andrew Meads, & Middleton Potts, *Shipping Dispute Resolution Forums: Competition and Cooperation*, 11 HONGKONG LAW. 78, 78 (2006) (noting that “London has enjoyed a traditional pre-eminence as an arbitration and court forum [in shipping dispute resolution], due to its imperial roots in the international shipping industry and commodity markets”).

<sup>72</sup> Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668.

be governed by the law of its home jurisdiction. Accordingly, the firm will often want a law firm that is familiar with local law. Another reason is that, as empirical research on law firms demonstrates, face-to-face interaction between lawyers and their clients is important.<sup>73</sup>

Local lawyers who meet these requirements are not available in many parts of the world today. Most law firms even in Germany or France, much less developing countries, lack lawyers who are licensed to litigate in a foreign country. However, this situation is quickly changing. We are seeing the rapid emergence of cross-jurisdictional law firms, with offices or affiliates all over the world, that can represent a client both in his state of origin and in the host state. Furthermore, at least in the United States, states can no longer demand a local residence as a precondition for admission to the local bar, since the Supreme Court has made it clear that such residency requirements violate the Privileges and Immunities Clause.<sup>74</sup> Consequently, an attorney does not have to reside in New York State in order to be admitted to the New York bar<sup>75</sup>.

## E. Summing Up

All other things equal, litigating locally is superior to litigating at a distance. But, in commercial litigation, all other things are not equal.

There seems every reason to believe that, for broad classes of commercial disputes in many jurisdictions, the burdens of extraterritorial litigation can be constrained sufficiently to make it a superior alternative to litigating locally in weak courts. The strong tendency of corporations from all over the U.S. and abroad—including not just publicly traded corporations but large privately held corporations as well<sup>76</sup>—to choose Delaware law and courts is evidence of this, as is the growing

---

<sup>73</sup> See, e.g., Andrew Jones, *More than “managing across borders?” the complex role of face-to-face interaction in globalizing law firms*, 7 J. ECON. GEOGRAPHY 223, 242 (2007) (concluding that face-to-face interaction is “a crucial form of practice that is shaping firm and industry success”). There is of course the possibility that the new technologies that make personal appearances in court less important will also reduce the need for face-to-face contact between clients and lawyers.

<sup>74</sup> See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (concluding that a rule imposing an in-state residency requirement as a precondition for admission to the New Hampshire bar violated the Privileges and Immunities Clause).

<sup>75</sup> Moreover, at least within the United States, it is relatively simple to be admitted to the bar of another jurisdiction. A law school graduate does not need a degree from an in-state law school, as long as her law school is ABA-approved. In many jurisdictions, it is possible to get admitted to the local bar without taking the bar exam as long as the candidate has practiced for a sufficient amount of time in another U.S. state. Moreover, even if a candidate must take the bar exam in order to be admitted to the bar, that hurdle should not be overestimated. While the bar exam typically has a state law component, the relatively limited length of bar review courses (typically no more than two months), as well as the usually relatively high bar passage rates among first-time exam takers, suggest the bar exam is no insurmountable hurdle for attorneys.

<sup>76</sup> See Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, working paper, The University of Texas School of Law, Law and Economics Research Paper 119, p. 5 (December 2, 2007) (finding that only about half of those closely held firms that have more than 1000 employees are incorporated in the state where their primary place of business is located and that “of those that are incorporated elsewhere, about 80% are incorporated in Delaware”).

tendency of European firms to incorporate in other EU states.<sup>77</sup> Further evidence is also offered by the increasing use of international arbitration, to which we turn next.

## VI. The Inadequacies of Arbitration

Even if, for litigants from countries with weak judicial systems, the public courts of foreign nations might often be superior to local courts in resolving commercial disputes, it remains to ask whether private arbitration might offer an even better alternative. There is strong reason to believe that the answer is no: while arbitration will continue to play an important and perhaps growing role in dispute resolution, for the foreseeable future it is unlikely to be an adequate substitute for public courts.<sup>78</sup>

### A. Empirical Evidence

The first reason for this conclusion is empirical. In practice, arbitration does not seem to compete strongly with well-functioning public courts.<sup>79</sup>

The best data available derive from Eisenberg and Miller's impressive analysis of more than 2800 large commercial contracts in which at least one party is a publicly-traded U.S. corporation.<sup>80</sup> The relevant contracts were of sufficient importance to be deemed material to the relevant corporation's affairs, and were therefore filed with the Securities Exchange Commission. Overall, only 11% of these contracts included binding arbitration clauses—10% of the domestic contracts and a still-small 20% of the international contracts (those involving a non-U.S. party).<sup>81</sup> Of the 89% of the contracts in the overall sample that did not call for arbitration, 40% specified the courts of a particular state as the choice of forum. Among the latter, 43% chose the courts of New York for their forum, followed by Delaware with 11% and California with 8%.<sup>82</sup>

In short, the overwhelming majority of these contracting parties—who were clearly sophisticated, well represented by legal counsel, and with much at stake—did not consider it in their mutual interest to resolve their disputes through arbitration rather than in the public courts. Indeed, the public courts of a single state—New

---

<sup>77</sup> Cf. Marco Becht, Colin Mayer, & Hannes Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, *ECGI Law Working Paper No. 70/2006*, August 2007, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=906066](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906066), p. 2 (“Between 2003 and 2006 over 67,000 new private limited companies were established in the U.K. from other E.U. Member States”).

<sup>78</sup> Cf. also Henry Hansmann, *Corporation and Contract*, AM. L. & ECON. REV. 1, 14-15 (2006) (arguing that states are superior at providing norms in part because they are more likely to adjust these norms to changing circumstances in a manner that is not biased towards any of the parties involved).

<sup>79</sup> Eisenberg & Miller, *Arbitration*, *supra* note 80, at 29.

<sup>80</sup> The construction of the sample, which Eisenberg and Miller explore in several essays, is described most thoroughly in Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts* 18-20 (Cornell Legal Studies Research Paper Series, Paper No. 06-023, 2006), available at SSRN: <http://ssrn.com/abstract=927423> [hereinafter Eisenberg & Miller, *Arbitration*].

<sup>81</sup> *Id.* at 21-23.

<sup>82</sup> Computed from figures in Theodore Eisenberg & Geoffrey Miller, *The Market for Contracts* 10, 17, 19 (NYU Center for Law and Economics, Law & Economics Research Paper Series Working Paper No. 06-45, 2006), available at <http://ssrn.com/abstract=938557> [hereinafter Eisenberg & Miller, *Market*].

York—were far more popular than arbitration. It is of course possible that the contracts in this sample were for some reason less amenable to arbitration than would be other contracts, and particularly contracts of more modest value. But there is no indication of this in the sample itself. That sample includes contracts dealing with a broad range of subjects, including mergers and acquisitions, sales of assets, commercial debt, and employment of senior executives. Moreover, the more standardized contracts in the sample in fact called for arbitration less often than the more idiosyncratic ones.

## B. International Arbitration

The Eisenberg and Miller data confirm the conventional wisdom that arbitration is more commonly provided for in international contracts than in domestic contracts—though they still find arbitration clauses in only 20% of the international contracts in their sample, as compared to anecdotal estimates that have often run much higher.<sup>83</sup> In any event, the reasons for choosing arbitration over courts in international disputes today need not extend to extraterritorial litigation in the future.

The two dominant reasons for choosing arbitration over courts, according to a broad survey of participants in international arbitration, are neutrality of the forum and enforceability of judgments in other jurisdictions.<sup>84</sup> The advantage in neutrality can be explained by the fact that the alternative to arbitration is to have their dispute adjudicated in the courts of one of the parties' home countries, since a judgment from the courts of a third state might not be enforceable. So the neutrality advantage is derivative of the advantage in enforceability.

The advantage in enforceability, in turn, is largely a consequence of the present state of international law. The New York Convention of 1958,<sup>85</sup> which provides widespread international enforcement of arbitral decrees, has been signed by more than 140 countries.<sup>86</sup> By contrast, the Hague Convention on Choice of Court Agreements, which would guarantee similar advantages with respect to foreign court decisions, still has not entered into force. If, as we discuss below, this imbalance is rectified, then arbitration will lose its important advantage over courts in enforceability and, as a consequence, in neutrality as well.<sup>87</sup>

---

<sup>83</sup> *Id.* at 17 (citing one estimate according to which as much as 90 % of international contracts have arbitration clauses). *Cf. also* Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1281 (2000) (asserting that “most international contracts now contain an arbitration clause, making arbitration, rather than court proceedings, the most common form of dispute resolution for these transactions”).

<sup>84</sup> CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF, & GABRIELE SCHERER, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 107-10 (2d ed., 2006).

<sup>85</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with regard to the United States Dec. 29, 1970).

<sup>86</sup> A list of the nations who have signed the convention is available on the website of the United Nations Commission on International Trade Law (UNCITRAL) at

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>87</sup> See Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9, 10-11 (2002) [hereinafter Silberman, *International Arbitration*] (stressing that with respect to predictability, “court adjudication and arbitration might well look more balanced,” if international law guaranteed the

### C. Arbitration's Handicaps

Why do contracting parties seem to prefer public courts to private arbitration when—as in the contracts sampled by Eisenberg and Miller—the neutrality of the courts and the enforceability of their judgments is not in serious doubt? The principal answer, it appears, is that arbitration, as it is typically practiced today, is a rather different service than that offered by courts.<sup>88</sup> Broadly speaking, arbitration serves primarily as a means of ex post dispute resolution, seeking to offer an acceptable settlement of a conflict once it has arisen. Adjudication in public courts, in contrast, is more focused on holding parties to the contractual commitments they made ex ante, before a conflict arose.

This view of arbitration is supported by survey data showing that participants find that courts have an advantage over arbitration in reaching predictable decisions.<sup>89</sup> An important reason for this advantage, evidently, is that arbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the chances that they will be chosen again in future disputes. The result is an incentive to render compromised judgments that do not badly offend either party.<sup>90</sup> Another reason for unpredictability is that, in

---

enforcement of choice of forum clauses in the same way that it now guarantees the enforcement of arbitration clauses).

<sup>88</sup> Extensive references to the large literature on the relative advantages of arbitration and courts—albeit a literature that is scarce on systemic data—are provided in Eisenberg & Miller, *Arbitration*, *supra* note 80, at 2-9.

<sup>89</sup> BÜHRING-UHLE ET AL., *supra* note 84, at 108 (reporting that a majority of survey respondents find arbitration less predictable than courts). Cf. also David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986) (analyzing 55 arbitration decisions and finding a “systematic tendency” of conventional arbitrators to “split-the-difference between the parties’ final offers with little additional systematic reference to the facts of the cases.”); Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 989 n.204 (1984) (“To the extent the arbitrator follows a certain set of rules and makes them known, he decreases his business, since those who would stand to lose under his rules would never agree to use his services.”); John V. O’Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a “Better Way”?*, 136 U. PA. L. REV. 1723, 1743 (1988) (noting that “arbitrators frequently compromise on decisions rather than resolve the underlying dispute between the parties”); Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1948 (1996) (arbitration’s exclusive focus on the resolution of the claim at issue may result in a compromise solution where a court would have resolved the claim more absolutely.); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 633 (1988) (“Research on this subject suggests that arbitrators do indeed “split the difference” between the conflicting demands of the parties, though it is impossible to say with what frequency this occurs.”); Silberman, *International Arbitration*, *supra* note 87, at 9 (claiming a “basic flaw of international arbitration” to be “its almost ‘lawless’ character as regards national law”).

<sup>90</sup> See, e.g., Henry S. Farber & Max H. Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration*, 54 ECONOMETRICA 819, 822 (1986) (“[O]ne possible motivation for arbitrators is that they attempt to make awards that maximize the probability they will be hired in subsequent cases . . . . The process by which arbitrators are selected for cases varies across settings, but it is generally true that *both* parties have a limited veto power. . . . Clearly, selection procedures such as this provide the incentive for the arbitrator to avoid making awards that are unacceptable to either party.”); John V. O’Hara, Comment, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a “Better Way”?*, 136 U. PA. L. REV. 1723, 1743 (1988) (“Considering that the parties normally select the arbitrators, and that the arbitrators only derive income

keeping with the parties' ability to choose their own arbitrators, and to reduce time and expense, arbitral decisions generally cannot be appealed.<sup>91</sup> And a third reason is that, in part to provide confidentiality to the parties, the transparency of arbitration awards still tends to be limited.<sup>92</sup>

But unprincipled and unpredictable decisions bring high costs. A fundamental reason for negotiating and drafting a contract is to constrain the parties' future behavior and render it predictable. If third party enforcement is to be effective in serving this end, it is important that, when the decision-maker is called upon to resolve a dispute, they interpret and enforce the contract as the parties intended when it was written. Compromise judgments minimize collective offense to the parties *ex post*. But the expectation of such judgments weakens the parties' ability to structure their transaction *ex ante*.

Evidence of the importance of this consideration is offered by the state of New York, which has taken various steps that make its courts attractive for litigation involving commercial contracts. Among those steps is the self-conscious adoption of relatively strict norms of contract interpretation that focus on the plain meaning of the document. To be sure, all U.S. states<sup>93</sup>—including New York<sup>94</sup>—allow the use of extrinsic evidence where a written contract is ambiguous. Yet despite this common point of departure, the views on the use of extrinsic evidence diverge widely. Some states go as far as allowing the use of extrinsic evidence regardless of any ambiguity in the text.<sup>95</sup> Another, much more widely held view continues to adhere to the plain meaning rule, but allows extrinsic evidence to be brought in with respect to the determination of whether the writing is ambiguous or not.<sup>96</sup> New York, by contrast, stubbornly adheres to the so-called “four corners” rule: Not only will an unambiguous

---

when they work, it does not require much imagination to realize that an arbitrator has a strong interest in keeping everyone as happy as possible. The best method of accomplishing this is compromise; thus, in the typical arbitration, neither side is as likely to prevail as in the ‘winner-take-all’ style of adjudication.”); Cf. David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986) (“[I]t might be the case that arbitrators often make decisions by reaching a mechanical compromise between the parties' final offers, without paying much attention to the merits of the case. This might be an optimal strategy for arbitrators who want to project an image of fairness so they are hired again by the parties.”).

<sup>91</sup> Silberman, *International Arbitration*, *supra* note 87, at 11 (noting “the lack of a genuine appeal” in arbitration proceedings).

<sup>92</sup> *Id.* (“By and large, arbitration remains confidential and even though one can now access published decisions by arbitrators, it would be unusual to find any dialogue about the underlying legal issues decided in an arbitration.”).

<sup>93</sup> See, e.g., E. Allan Farnsworth, 2 Farnsworth on Contracts § 7.12 (2001).

<sup>94</sup> E.g., *South Rd. Assocs., LLC v. IBM*, 826 N.E.2d 806, 810 (N.Y. 2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004).

<sup>95</sup> E.g., *Froines v. Valdez Fisheries Dev. Ass'n*, 75 P.3d 83, 88 (Alaska 2003); *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 771 n.1 (Alaska 1982); *Stuhmer v. Centaur Sculpture Galleries*, 871 P.2d 327, 330 (Nev. 1994); *Hilton Hotels Corp. v. Butch Lewis Prods.*, 808 P.2d 919, 921 (Nev. 1991); *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242-43 (N.M. 1991).

<sup>96</sup> E.g., *Walls v. Bank of Prattville*, 575 So.2d 1081, 1083 (Ala. 1991); *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006); *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. 1991).

contract be interpreted according to its terms, without recourse to extrinsic evidence,<sup>97</sup> but New York also refuses to consider extrinsic evidence to determine whether the writing is ambiguous.<sup>98</sup> And, because the question of ambiguity is one of law that is for the court to decide,<sup>99</sup> the result is that New York law offers parties to a contract a high degree of control over the governance of their affairs through careful drafting of their contract. It is unclear whether New York courts have followed this approach with a view to maintaining the attractiveness of New York law to foreign litigants in particular. However, what is certain is that New York courts are very much aware that their case law on contract interpretation is of particular importance to commercial transactions. Thus, the four corners rule has been explicitly justified on the grounds that it “imparts ‘stability to commercial transactions . . .’”<sup>100</sup> And, in particular, it protects against the kinds of unprincipled—and hence *ex ante* unpredictable and uncontrollable—judgments to which arbitration is prone.<sup>101</sup>

This is not to deny that there are types of commercial actors, and types of disputes, for which the advantages that arbitration has to offer—such as greater confidentiality,<sup>102</sup> procedural flexibility,<sup>103</sup> and preservation of ongoing commercial relations—will remain sufficiently important to assure continued demand for arbitration even if the alternative is a highly efficient system of public courts. But, as the Eisenberg and Miller contract sample strongly suggests, this could well represent a relatively small fraction of all commercial contracts.

Of course, the handicaps of arbitration vis-à-vis public courts might still be acceptable to contracting parties if arbitration offered economies that made it much faster or less expensive than is litigation in the public courts, and hence compensated for the handicaps. But this appears generally not the case. Commercial arbitrators are typically individuals who have other sources of employment and who are paid by the hour for their services. Both of those features are evidently important in giving parties the broad discretion in choice of decision-makers that is among the important benefits of arbitration. The consequence, however, is a weak incentive to economize on time and cost. This helps explain why survey evidence suggests that cost is not

---

<sup>97</sup> *E.g.*, *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004); *South Rd. Assocs., LLC v. IBM*, 826 N.E.2d 806, 809 (N.Y. 2004); *Signature Realty, Inc. v. Tallman*, 814 N.E.2d 429, 430 (N.Y. 2004); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004).

<sup>98</sup> *E.g. South Rd. Assocs. LLC*, 826 N.E.2d at 810; *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *W.W.W. Assoc., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990).

<sup>99</sup> *E.g. South Rd. Assocs. LLC*, 826 N.E.2d at 810; *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2004); *Kass*, 696 N.E.2d at 180; *W.W.W. Assoc., Inc.*, 566 N.E.2d at 642.

<sup>100</sup> *W.W.W. Assoc., Inc.*, 566 N.E.2d at 642 (citing FISCHE, NEW YORK EVIDENCE § 42, at 22 [2d ed]).

<sup>101</sup> On the importance of ensuring the enforcement of contractual commitments see, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 557–66 (2003) (explaining the conditions under which legal enforcement of contractual promises is necessary for welfare maximization).

<sup>102</sup> See, e.g., Gregg A. Paradise, Note, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDH. L. REV. 247, 248 (1995).

<sup>103</sup> See, e.g., Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 244 (2003); Paradise, *supra* note 102, at 248.

generally considered an advantage of arbitration,<sup>104</sup> and many participants do not consider speed an advantage either.<sup>105</sup>

#### D. Can Better Forms of Arbitration Be Devised?

It remains to ask whether alternative forms of arbitration might be developed that avoid the handicaps just mentioned and that offer the principal benefits of public courts. What if, for example, a private dispute resolution service were to (1) employ salaried full-time decisionmakers who are assigned to disputes rather than chosen by the litigants, (2) publish opinions, (3) provide for appellate review, and possibly even (4) develop their own bodies of substantive commercial law? (Some arbitration services in fact already offer one or more of these features, at least as an option for the parties.<sup>106</sup>) Might such a private service serve as a superior alternative, for residents of nations with weak courts, to extraterritorial litigation?

There is good reason to be skeptical.<sup>107</sup> Governments have natural advantages in establishing effective judicial systems. The governments of likely host states are large, long-established, and durable entities with worldwide reputations. Their courts already have track records built up over scores, or even hundreds, of years. It could take a very long time for private services to establish equivalent renown and credibility.

Moreover, the quality of adjudication that the courts of a state provide for nonresidents cannot easily be varied from that offered to the state's own citizens. Consequently, a state's political accountability to its citizens provides some assurance that the state will not deviate excessively from principled decision-making just to please one or another important class of foreign litigants. In effect, at least for courts in states with well-functioning political systems, the courts' responsibility to their domestic clientele bonds their credibility to their foreign clientele. A private arbitration service, regardless of its mode of organization, could have difficulty

---

<sup>104</sup> BÜHRING-UHLE, KIRCHHOFF, & SCHERER, *supra* note 84, at 109 (noting that only 41 % of respondents considered arbitration to be "generally less expensive" as opposed to 43 % of respondents finding arbitration to be "generally not less expensive"). Cf. also Silberman, *International Arbitration*, *supra* note 87, at 9 (expressing skepticism vis-à-vis the proposition that arbitration is cheaper for the parties than adjudication).

<sup>105</sup> BÜHRING-UHLE, KIRCHHOFF, & SCHERER, *supra* note 84, at 110 (noting that while 67% of survey respondents consider arbitration to be "generally faster", 21 % believe arbitration to be "generally not faster", and 8 % consider it "faster only compared to litigation in particular countries").

<sup>106</sup> Alec Stone Sweet, *The New Lex Mercatoria and transnational Governance*, 13 J. EUR. PUBL. POL'Y 627, 642-43 (2006) (describing the judicialization of international arbitration). See generally Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 52-61 (1999) (describing the supply of "judicialized arbitration"); Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 277 (2007) (noting that "[i]n some contexts, such as securities and complex commercial cases, arbitration has become highly formalized, with routine discovery and motion practice, the application of substantive legal rules, and written and reasoned awards").

<sup>107</sup> Beyond the difficulties, noted here, that face arbitration in mimicking the attributes of courts, there is the fact that "the more arbitration mimics litigation, the more costly the system will become to run." Stone Sweet, *supra*, at 643.



allaying the suspicion that it tempers its judgments to avoid offending firms or industries that are important repeat customers.

Sovereign states can also signal the integrity of their judges by providing that corruption is subject to harsh criminal sanctions. Given that criminal sanctions cannot easily be mimicked by contractual means, arbitrators have no comparable advantage.

Finally, just as arbitration might be restructured to adopt some of the advantages of courts, courts can be reformed to offer some of the advantages of arbitration, and hence become more competitive themselves. One obvious step—and one that many jurisdictions have already taken—is to create special business programs or commercial divisions which ensure that judges can develop the expertise that comes with specialization.<sup>108</sup> Another evident step is to focus on better case management and streamlined procedures to speed up proceedings.<sup>109</sup>

In sum, while private arbitration services can be expected to continue to grow and to offer more diverse styles of adjudication, for the foreseeable future it is likely that the public courts of prominent host states will be in a position to offer a superior alternative for domestic litigants faced with weak local courts. If public courts are to realize their full potential in this respect, however, it will first be necessary to remove some legal obstacles. We turn to those next.

## VII. Legal Obstacles: Jurisdiction and Enforcement

For parties to litigate extraterritorially, two basic conditions must be met. First, the parties must be able to select the forum in which they wish to litigate. Second, they must be able to have the resulting judgment recognized and enforced in their home state. At present, neither of these elements is widely established at the international level.

Our principal concern here is with litigation in which the state of origin and the host state are entirely independent of each other, apart from treaties and conventions to which they are both signatories. The most extensive experience with extraterritorial litigation, however, is found—not surprisingly—within federated systems of states such as the United States and the European Union. For perspective, therefore, we begin by focusing on developments in the latter two systems, and turn afterward to the fully international context.

---

<sup>108</sup> Cf. Mitchell L. Bach and Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 151, 152-202 (2004) (describing the commercial divisions and business programs set up in various U.S. states).

<sup>109</sup> The aims of the business programs and commercial divisions that U.S. jurisdictions have created over the course of the last decade typically included better case management and the avoidance of delays. Cf. *id.* at 152—53 (noting that the goals behind the creation of New York’s Commercial Division included expediting cases, reducing expense, creating consistency in case management, and creating judicial expertise in business and commercial matters”). Cf. also Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 676 (1997) (“Litigation reform efforts in the United States have sounded a consistent theme of the need to reduce expense and delay.”).

## A. The United States

Within the United States, it is relatively easy for contracting parties from one state to commit themselves to litigate in the courts of another state. The means to do so are forum selection clauses. Following the lead of the U.S. Supreme Court,<sup>110</sup> most state courts now enforce such clauses provided that they are reasonable and do not deprive a litigant of his day in court.<sup>111</sup> To be sure, in some states the chosen court theoretically has the power to apply the forum non conveniens doctrine and refuse to exercise its jurisdiction despite the presence of a valid forum selection clause.<sup>112</sup> However, that power is rarely invoked.<sup>113</sup>

---

<sup>110</sup> See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clauses are enforceable unless enforcement is unreasonable). See also *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (holding that clause is enforceable unless shown to be unreasonable, unfair, or unjust). Admittedly, a federal district court may, for the convenience of parties and witnesses, transfer any civil action to any other district where the relevant action might have been brought. 28 U.S.C. § 1404(a) (2000). However, the court will typically refuse to invoke this power to override the choice of the parties in the presence of a valid forum selection clause. Cf. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (noting that a forum selection clause is “rarely . . . outweighed by other . . . factors”); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (holding that a forum selection clause is a “significant factor that figures centrally in the . . . calculus.”).

<sup>111</sup> This is true, first, for the courts of the jurisdiction that has been selected. *E.g.*, *Capital Group Cos. v. Armour*, 2004 Del. Ch. LEXIS 159 at \*23 (holding that forum selection clauses are generally enforced unless party is denied day in court or placed at substantial and unfair disadvantage); *Aon Corp. v. Utley*, 863 N.E.2d 701, 707 (Ill. App. 2006) (holding that a forum selection clause will be enforced unless it deprives one party of her day in court). But see *Vanier v. Ponsoldt*, 833 P.2d 949, Syl. P2 (Kan. 1992) (insisting on the need for a “reasonable relationship” between the transaction and the selected forum); *In re the Marriage of Yount*, 122 P.3d 1175, 1179 (Kan. App. 2005) (same); *Aylward v. Dar Ran Furniture Indus.*, 87 P.3d 341, 344 (Kan. App. 2004) (same). Courts that are asked to dismiss the case because a different forum has been chosen also typically enforce forum selection clauses. See, *e.g.*, *Société Jean Nicolas et Fils, J. B. v. Mousseux*, 597 P.2d 541, 543 (Az. 1979) (holding that in the absence of fraud, a fairly bargained for forum selection clause will be enforced as long as it is reasonable and does not deprive a litigant of his day in court.); *Parsons Dispatch, Inc. v. John J. Jerue Truck Broker, Inc.*, 199 S.W.3d 686, 690 (Ark. App. 2004) (holding that clause will be enforced unless “unreasonable and unfair”); *Terry v. Student Transp. of Am.*, 2001 Conn. Super. LEXIS 3664 at \*5 (holding that clause is enforceable unless enforcement is unreasonable); *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 48 (Ind. App. 2005) (holding that clause is enforceable if “reasonable and just under the circumstances” and “no evidence of fraud or overreaching”); *Forrest v. Verizon Communs., Inc.*, 805 A.2d 1007, 1010 (D.C. App. 2002) (holding that clause is enforced unless unreasonable); *Prezocki v. Bullock Garages*, 938 S.W.2d 888, 889 (Ky. 1997) (holding that clause is enforced unless “unfair or unreasonable”); *Ex parte Soprema, Inc.*, 949 So.2d 907, 912 (Ala. 2006) (holding that outbound forum selection clause will be enforced unless unfair or unreasonable). Even in states that consider outbound forum selection clauses invalid, these clauses are sometimes deemed relevant to the application of the forum non conveniens doctrine. *E.g.*, *Davenport Machine & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982). See also *Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2411 (1998) (noting that “most states enforce forum selection clauses”).

<sup>112</sup> See, *e.g.*, *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg.*, 873 S.W.2d 537, 539 (Ark. 1994); *Olinick v. BMG Entertainment*, 42 Cal. Rptr. 3d 268, 274 (Cal. App. 2006). But see *Terry v. Student Transp. of Am.*, 2001 Conn. Super. LEXIS 3664 at \*8, \*12 (declaring the forum non conveniens standard to be inapplicable in case of a forum selection clause); *Aon Corp. v. Utley*, 863 N.E.2d 701, 708 (Ill. App. 2006) (finding that defendant had waived arguments based on forum non conveniens by agreeing to forum selection clause).

<sup>113</sup> See, *e.g.*, *Olinick, supra* note 112, at 274 (noting that “[c]laims that the previously chosen forum is unfair or inconvenient are generally rejected”).

Just as importantly, once a judgment has been rendered in the host state, it is relatively easy for the judgment creditor to have that judgment recognized and enforced in the defendant's home state. Under the Full Faith and Credit Clause of the U.S. Constitution, each state must recognize and enforce final judgments from other states.<sup>114</sup> While states can refuse to enforce a judgment if the court that handed down the judgment lacked jurisdiction,<sup>115</sup> forum selection clauses are deemed a sufficient basis for the exercise of jurisdiction.<sup>116</sup>

As a practical matter, too, the enforcement of judgments from other states is unproblematic, at least where money judgments are concerned. Most states only require that an authenticated copy of another state's judgment be filed in a domestic court in order for that judgment to become enforceable.<sup>117</sup>

## B. The European Union

In the European Union, the legal framework makes it even easier than in the U.S. to commit to litigate in a foreign forum. However, the enforcement of the resulting judgment can be more difficult.

A Council Regulation adopted in 2000<sup>118</sup> provides that forum selection clauses in contracts between merchants are generally valid. The basic rule is that, as long as one or more of the parties is domiciled in any of the Member States, the parties can agree that the courts of a particular Member State, or one particular court in a particular Member State, shall have jurisdiction to the exclusion of all other courts.<sup>119</sup> The designated court cannot invoke the forum non conveniens doctrine.<sup>120</sup> Moreover,

---

<sup>114</sup> U.S. Const. art. IV, § 1. There is no public policy exemption to the full faith and credit clause. *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934).

<sup>115</sup> *E.g.*, *Bd. of Public Works v. Columbia College*, 84 U.S. 521, 528 (1873).

<sup>116</sup> *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985); *Phoenix Leasing v. Kosinski*, 707 A.2d 314, 316 (Conn. App. 1998).

<sup>117</sup> All U.S. states except California, Indiana, Massachusetts, and Vermont have adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA), 13 U.L.A. 154 (1986) (hereinafter UEFJA). *See* Nat'l Conf. of Comm'rs on Unif. St. Laws, A Few Facts about the Uniform Enforcement of Foreign Judgments Act, at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uefja.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uefja.asp) (last visited Jan. 28, 2008). Under the UEFJA, the procedure prescribed for the enforcement of sister state judgments is very simple: First, the judgment creditor must file an authenticated copy of the foreign judgment in a domestic court. UEFJA § 2. A filing fee must be paid in the state where the judgment is to be enforced. However, these fees are modest in most states. In Texas, for example, the judgment creditor usually has to pay a flat fee in the amount of \$50. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 35.007(a) (Vernon Supp. 2006) (declaring that the fee to be paid is the regular fee for filing suit); TEX. GOV'T CODE ANN. § 51.317 (Vernon 2006) (setting the regular filing fee at \$50). Once the copy has been filed, the foreign judgment has the same effect as a judgment of the court in which it is filed. UEFJA § 2. Admittedly, the judgment debtor can seek to vacate or stay the judgment on the ground that it was not entitled to full faith and credit. *Id.* However, such an attack is governed by the same procedures and rules that govern an attack on the judgment of a domestic court. *Id.* Moreover, the burden of proof is borne by the judgment debtor. *Id.* § 4.

<sup>118</sup> Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12), 1 (hereinafter Council Regulation).

<sup>119</sup> *See* Council Regulation, *supra* note 118, art. 23(1)(1).

<sup>120</sup> Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISPUTE RES. 185, 208 (2004) (observing that where parties have

unless the parties have agreed otherwise, the forum selection clause prevents other courts from exercising jurisdiction over the case.<sup>121</sup>

As regards the enforcement of the resulting judgments, the same Council Regulation requires Member States to recognize and enforce judgments handed down by courts in other Member States.<sup>122</sup> However, the practical obstacles that European litigants have to overcome are considerably greater than those faced by their U.S. counterparts.

The Council Regulation provides that a judgment from a foreign Member State will be enforced once it has been declared enforceable,<sup>123</sup> which in turn requires that the judgment creditor apply to a domestic court.<sup>124</sup> The relevant procedure is governed by the domestic law of the member state where enforcement is sought.<sup>125</sup> Community law goes to some length to ensure that this procedure is neither overly time-consuming nor unduly complicated or expensive. Most importantly, the Council Regulation requires that the foreign judgment be declared enforceable “immediately” upon completion of certain formalities set forth in the regulation.<sup>126</sup> Moreover, as in the United States, the judgment debtor can attempt to show that the foreign judgment is not entitled to recognition, but cannot do so before the judgment is declared enforceable.<sup>127</sup> Finally, to limit the amount of fees that are levied, the Council Regulation prohibits the member states from charging fees in reference to the value of the matter.<sup>128</sup> This means that the Member States are limited to imposing flat fees, which in practice tend to be quite modest.<sup>129</sup>

Nonetheless, the formalities to be followed by a judgment creditor are somewhat more burdensome under European Law than under U.S. law.<sup>130</sup> Moreover, and more

---

negotiated a forum in advance, “as between courts in Europe, there is no role for discretionary dismissal in contract cases”).

<sup>121</sup> See Council Regulation, *supra* note 118, art. 23(1)(2).

<sup>122</sup> Moreover, the grounds for denying recognition, while slightly more numerous than under U.S. law, are very limited. Council Regulation, *supra* note 118, arts. 34, 35 (providing that grounds for non-recognition include irreconcilability with a domestic judgment or with an earlier judgment from another member state, certain cases of lack of jurisdiction, inadequate service of process in case of default judgments, or a manifest conflict with the publicly policy of the state where enforcement is sought).

<sup>123</sup> *Id.* art 38 (1).

<sup>124</sup> *Id.* art. 39(1).

<sup>125</sup> *Id.* art 40(1).

<sup>126</sup> *Id.* art 41(1).

<sup>127</sup> *Id.* art. 41. Rather, she can only appeal the decision to declare the foreign judgment enforceable. *Id.* art. 43(1). And, as in the United States, the reasons on which the appeal can be based are very limited. The Council Regulation specifically prohibits domestic courts from reviewing the foreign judgment as to its substance. *Id.* art. 45(2). Rather, the court can only examine whether one of the above-mentioned grounds for non-recognition is given. *Id.* art. 45(1).

<sup>128</sup> *Id.* art. 52.

<sup>129</sup> For example, in Germany, a flat fee of €200 is levied if no appeal is brought. Gerichtskostengesetz [GKG-KV][Court Costs Act], May 5, 2004, Bundesgesetzblatt [BGBl] I 718, as amended, Anhang 1 (Kostenverzeichnis) No. 1510.

<sup>130</sup> The judgment creditor must produce “a copy of the judgment which satisfies the conditions necessary to establish its authenticity.” Council Regulation, *supra* note 118, art. 53(1). He must also provide the court with a specific “certificate,” which is a standardized form to be filled out by a court or other competent authority in the state where the judgment was issued. *Id.* art. 53(2). The domestic court

importantly, the Community procedure for having sister state judgments declared enforceable is more likely to engender delay. In most states, the mere act of filing is insufficient for the foreign judgment to become enforceable. Rather, the domestic court of the state where the enforcement is sought must render a decision. What is more, the Council Regulation allocates the decision-making responsibilities in a manner that can engender delay. For example, it specifically provides that in Germany, the matter is to be brought before a judge presiding over a chamber of judges at the Landgericht (court of appeal).<sup>131</sup> The presiding judge cannot delegate the decision.<sup>132</sup> To be sure, because of its formal character, this procedure does not have to be time-consuming. Yet, unlike in the United States, the creditor cannot be sure that delay will be avoided.<sup>133</sup>

### C. Internationally

As between independent nations, the enforceability of forum selection clauses has traditionally been governed by a mixture of multilateral conventions, bilateral treaties, and national law.<sup>134</sup> Accordingly, parties' capacity to litigate before a court of their

---

can demand a certified translation of the relevant documents, though it is not required to do so. *Id.* art. 54(2).

<sup>131</sup> *Id.* Annex II.

<sup>132</sup> Reinhold Geimer, *Anh. III AVAG, in ZIVILPROZESSORDNUNG* [CODE OF CIVIL PROCEDURE], 2829 (Richard Zöller ed., 25th ed. 2005).

<sup>133</sup> Cf. Francisco Ramos Romeu, *Litigation Under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments*, 38 INT'L LAW. 945, 951 n.38 (2004) (noting that it takes "less than six months" to have a foreign judgment from another member state declared enforceable in Spain).

<sup>134</sup> The United States has is not bound by any multilateral convention regarding the recognition of foreign judgments. Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 6 (2004). With respect to bilateral treaties, the situation is more complex. The United States has concluded treaties on Friendship, Commerce, and Navigation (FNC) with various countries. See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, U.S.T. 2063, T.I.A.S. No. 2863. Among other things, these treaties typically provide that the nationals of each contracting party shall enjoy equal access to the other contracting party's courts of law. *Id.* The Third Circuit and the Eleventh Circuit have interpreted these provisions to require that foreign judgments be accorded the same treatment as sister state judgments. *Choi v. Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (holding that the FNC treaty between the United States and the Republic of Korea "elevates a Korean judgment to the status of a sister state judgment"); *Daewoo Motor Am. v. GMC*, 459 F.3d 1249, 1259 (11th Cir. 2006) ("Under The Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, . . . a Korean judgment is elevated to the status of a sister state judgment."); *Vagenas v. Continental Gin Co.*, 988 F.2d 104, 107 (11th Cir. 1993) (holding that the FNC treaty between the United States and Greece "mandates foreign country judgments be treated the same as sister state judgments"). These decisions seem to imply that the relevant foreign judgments must be recognized and enforced under the same rules governing the recognition and enforcement of sister state judgments. Cf. Russell J. Weintraub, *How Substantial is Our Need for a Judgments Recognition Convention and What Should We Bargain Away to Get it?*, 24 BROOKLYN J. INT'L L. 167, 167-68 (1998) (mentioning the FNC treaties as an exception to the rule that the United States has not entered into treaties calling for the recognition and enforcement of foreign judgments). We are skeptical, though, whether the U.S. Supreme Court, which has not yet ruled on the matter, would embrace such a view. We cannot see how a nation's promise to grant nondiscriminatory access to its own courts can be interpreted as a promise to recognize and enforce foreign judgments. Cf. Linda Silberman, *Comparative Jurisdiction in the International*

choice depends on exactly which jurisdictions are involved. In general, while there are many jurisdictions willing to hear cases involving foreign litigants, the ability of the litigants to get the resulting judgments enforced in their home state is often fraught with uncertainty.<sup>135</sup>

At first glance, these problems may seem to be transitory. This is because the Hague Convention on Choice of Court Agreements of 30 June 2005 (the “Hague Convention”)<sup>136</sup> explicitly provides for the recognition and enforcement of judgments in commercial matters in the presence of a forum selection clause.<sup>137</sup> There is,

---

*Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 321 (2002) [hereinafter Silberman, *Comparative Jurisdiction*] (stating that “[t]he United States is not a party to any bilateral judgments convention”).

Other countries have shown themselves more willing to use bilateral treaties and multilateral conventions to govern the recognition of foreign judgments. For example, the members of the European Free Trade Association (EFTA)—Norway, Switzerland, Liechtenstein, and Iceland—are not part of the European Community and therefore are not subject to the Council Regulation discussed *supra* text accompanying note 118. However, in 1988, three of the four EFTA countries, namely Switzerland, Norway, and Iceland, as well as the Member States of the European Community concluded the so-called Lugano Convention, the content of which almost literally matches that of the Council Regulation. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, 28 I.L.M. 620.

<sup>135</sup> The enforcement of U.S. judgments in foreign countries is a case in point. In some countries, it is relatively easy to have U.S. judgments recognized. For example, U.S. judgments not involving punitive damages will generally be recognized and enforced in Germany. *E.g.*, Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT’L L. 175, 200 (2005). By contrast, Belgian courts will only do so after reviewing the relevant judgments on the merits. The Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 399 (2001) [hereinafter Committee, *Survey*]; Nicole van Crombrughe, *Belgium*, in PROCEDURES TO ENFORCE FOREIGN JUDGMENTS 9, 13 (Paul J. Omar ed., Burlington, Vt. 2002); Ray Y. Chan, Note, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. INT’L L.J. 141, 189 n.249 (1999). Even assuming that a U.S. judgment will eventually be recognized and enforced in another jurisdiction, there is the question of how much delay will result. There, too, the situation differs drastically from country to country. For example, it has been estimated that having a U.S. money judgment declared enforceable takes six months to one year in Spain. Romeu, *supra* note 133, at 951 n.38. In South Africa, it reportedly takes between one and two years. Committee, *Survey*, *supra*, at 409. *Cf. also* Silberman, *Comparative Jurisdiction*, *supra* note 134, at 321 (noting that “enforcement of U.S. judgments abroad is often resisted”).

<sup>136</sup> Hague Convention, *supra* note 8.

<sup>137</sup> The Hague Convention applies to exclusive choice of forum agreements in civil and commercial matters, which are defined as agreements that designate “the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.” *Id.* arts. 1(1), 3(a). With respect to the validity and effect of forum selection clauses, the Hague Convention distinguishes between two situations.

The first is that in which one of the parties brings suit in the courts of the state chosen in the parties’ agreement. The validity of the forum selection clause is then determined according to the law of that state. Moreover, the Convention specifically provides that, if the forum selection clause is valid according to the law of the chosen state, the courts of that state may not decline to exercise their jurisdiction on the ground that the dispute should be decided in a court of another State. *Id.* art. 5(1). In other words, assuming the validity of the choice of forum clause, there is no rule such as the forum non conveniens doctrine that would allow the court to decline to hear the case.

The second situation is that in which the plaintiff ignores the forum selection clause and brings suit in a jurisdiction other than the designated (“chosen”) one. In that case, the validity of the forum selection clause still has to be judged according to the law of the chosen state. Accordingly, the court seized by the plaintiff

however, ample reason for skepticism that the Hague Convention will in fact remove the principal legal obstacles to extraterritorial litigation. To begin with, it remains uncertain whether the Convention will enter into force. To date, none of the states involved in the negotiation of the Convention has ratified it.<sup>138</sup>

Moreover, the Convention only governs “international cases.”<sup>139</sup> In determining what constitutes an international case, the Convention distinguishes between two situations. The first is that in which a foreign judgment exists and the judgment creditor seeks to enforce that judgment. The case then automatically qualifies as international regardless of where the parties are from and where the events giving rise to the litigation took place.<sup>140</sup> The second situation, in which a foreign court has not yet handed down a judgment, is more complicated. At that stage, a case qualifies as international “unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”<sup>141</sup> Consequently, there is no duty to respect forum selection clauses in cases that only have ties to one country: The chosen host state does not have a duty to hear the case, nor does the Convention impose a duty on other courts to abstain from hearing the case. Consequently, the Convention provides little assurance to parties to a purely domestic

---

in violation of the forum selection clause must suspend or dismiss the case if the forum selection clause is valid according to the law of the chosen state. *Id.* art. 6(a). While there are a number of exceptions to this rule, none are unreasonable. In particular, there is no obligation to dismiss the case if (a) one of the parties lacked the capacity to conclude the agreement under the law of the state of the court seized, (b) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seized, (c) the choice of forum agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties, or (d) the chosen court has refused to hear the case. *Id.*

Once the chosen court has handed down a judgment, the authorities in other jurisdictions are generally required to recognize and enforce judgment. *Id.* art. 8. There are only very few exceptions to that rule. See *id.* art. 9 (listing situations in which other jurisdictions can refuse recognition and enforcement).

<sup>138</sup> However, one country that was not involved in negotiating the Convention Mexico, has acceded to the Convention. See Hague Conference on Private International Law, Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98).

Nonetheless, some commentators seem optimistic regarding the Convention’s chances of entering into force. See, e.g., Christopher Tate, Note, American Forum Non Conveniens in Light of the Hague Convention on Choice-of-Court Agreements, 69 U. PITT. L. REV. 165, 166–67 (2007) (“The Hague Convention is currently awaiting ratification, and most commentators expect that process to eventually succeed as many states, especially the U.S., are interested in placing their litigated judgments on an equal playing field with arbitral awards.”); Chadbourne & Parke LLP, United States, The Hague Convention on Choice of Court Agreements: A New York Style Global Convention for Litigants, MONDAQ BUSINESS BRIEFING (Feb. 14, 2006) (claiming that according to the State Department, becoming a party to the Convention is a high priority); Andrew C. Schneider, New Treaty Will Help Firms Operate Abroad, KIPLINGER BUSINESS FORECASTS (Oct. 10, 2005) (expressing confidence that Convention will pass Congress “without difficulty” and that it will be signed by the EU Member States as well as by Canada, Mexico, Japan, and China). U.K. commentators seem slightly more cautious. See Patrick Sherrington & Daniela Vella, Choice words, LEGAL WEEK (Jan 12, 2006) (claiming it is “difficult to say exactly when the Convention will enter into force” in the U.K.).

<sup>139</sup> *Id.* art. 1 (1).

<sup>140</sup> *Id.* art. 1 (3).

<sup>141</sup> *Id.* art. 1 (2).

contract that their choice of a foreign court will be respected. The chosen court may refuse to hear the case, or one of the parties may successfully, once a dispute has arisen, successfully renege on the contractual forum selection agreement and bring suit in a local court.

To be sure, this limitation to the Convention might not matter much if the parties could easily turn their dispute into an international one. However, that is apparently not the case. As the text of the Convention makes clear,<sup>142</sup> the mere choice of a foreign forum in the contract is insufficient to create an international case. Moreover, while the Convention is—apparently intentionally—vague on the issue, it can be interpreted as well to provide that the choice of foreign substantive law does not suffice to turn an otherwise domestic case into an international one.<sup>143</sup>

In sum, the Hague Convention is an important step in the right direction. Yet, even if it were ratified by a significant number of countries, which remains problematic, it would still be insufficient to ensure that extraterritorial litigation becomes generally available at the global level.

We will suggest below some reforms to remedy this situation, after examining the extent of extraterritorial litigation in current practice.

## VIII. Evidence of Demand and Practice

It is difficult to find systematic data on the current extent to which parties are currently choosing foreign forums to decide otherwise domestic commercial disputes. The available evidence suggests two conclusions, however. First, the potential

---

<sup>142</sup> *See id.*

<sup>143</sup> Under the text of the Convention, the international character of the case is to be denied only where “all other elements to the dispute” are connected with the state where the parties reside. On the one hand, the word “element” is certainly broad enough to encompass a choice of law clause. On the other hand, the apparent purpose of the provision in question is to ensure that the chosen court is under no obligation to hear a case that is completely internal to a third country and that the courts of that third country are not prevented from hearing the case. In other words, the provision at issue purposefully restrains the freedom of the parties to select a court of their choice. If the choice of a foreign legal system were enough to turn a case into an international one, this restriction would lose much of its practical importance. Consequently, there is considerable tension between the plain meaning of the provision at issue and its purpose. Moreover, the resulting ambiguity cannot be resolved by looking to the preparatory works. That is because the preparatory works prove no clearer than the text and purpose. On the contrary, the Draft Report on an earlier version contains the following passage:

The objection to the reference to “the relationship of the parties and all elements relevant to the dispute” is its vagueness. For example, if the parties designated a foreign system of law as the governing law of the contract, would this mean that all elements of the dispute were no longer connected with the same State?

Hague Conference on Private International Law, Preliminary Document No 25 of March 2004, drawn up for the attention of the Special Commission of April 2004 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report 22 (March 2004), drawn up by Masato Dogauchi and Trevor C. Hartley, available at [http://www.hcch.net/upload/wop/jdgm\\_pd25e.pdf](http://www.hcch.net/upload/wop/jdgm_pd25e.pdf). In other words, the drafters were fully aware of the vagueness of the Convention with respect to the issue at hand, yet abstained from clarification.



demand for extraterritorial litigation is strong. When faced with a choice among different states' public courts as forum, sophisticated contracting parties prefer courts with a conspicuously strong reputation for high quality adjudication, even when the alternatives are other systems of public courts that are themselves reasonably strong. Second, despite this potential demand, the actual amount of pure extraterritorial litigation is extremely modest, even among the federated states of the United States and the European Union.

### A. The United States

Again, by far the most comprehensive data on choice of forum clauses in the U.S.—and perhaps in the world—are in Eisenberg and Miller's study of roughly 2800 contracts filed with the U.S. Securities Exchange Administration.<sup>144</sup> For 47% of these contracts, the reporting firm was incorporated in Delaware, reflecting that state's overwhelming dominance in choice of law (and, implicitly, choice of forum) for internal corporate affairs. No other state accounted for as much as 4% of the reporting firms.<sup>145</sup> Yet Delaware did not similarly dominate choice of law or choice of forum for the contracts themselves. Rather, New York law and courts were the clear favorites in those roles. Virtually all of the contracts specified choice of law, and 46% of them chose New York law, while Delaware law—the second most frequent choice—was specified by only 15%. Only 39% of the contracts stated an explicit choice of forum (which generally coincided with choice of law), but of those that did, 41% chose New York, while Delaware again ran a distant second with only 11%.<sup>146</sup>

In light of these numbers, there can be little doubt that New York is the leading forum for commercial dispute resolution in the United States. Moreover, as Eisenberg and Miller observe:

New York's choice of law dominance likely does not stem from contract-specific contacts with New York. New York accounts for only about 12 percent of the reporting firms' places of business, three percent of the reporting firms' places of incorporation, and eleven percent of the attorney locales.<sup>147</sup>

Evidently New York's attraction, rather, emanates in large part from the perceived quality of its law and its courts.

New York has clearly sought this prominence. We have already remarked that New York has self-consciously developed contract law doctrine that appeals to commercial actors.<sup>148</sup> Moreover, in 1995 New York—whose judges are elected—established a special Commercial Division staffed by judges chosen for their expertise in commercial matters and utilizing case management techniques designed to improve

---

<sup>144</sup> See *supra* text accompanying note 80.

<sup>145</sup> Eisenberg & Miller, *supra* note 38, at 27 tbl. 8.

<sup>146</sup> *Id.* at 33 tbl. 11.

<sup>147</sup> *Id.* at 27.

<sup>148</sup> See *supra* text accompanying notes 93—100.

their efficiency.<sup>149</sup> And New York law explicitly guarantees the enforcement of forum selection clauses in contractual disputes involving amounts in excess of \$1 million.<sup>150</sup>

Eisenberg and Miller report that, in 66.5% of the contracts in their sample that provide for the application of New York law, New York is neither the reporting party's principal place of business or state of incorporation nor the seat of the reporting party's attorney. They do not, however, report the percentage of contracts designating New York as a forum without *either* party having its corporate domicile or principal place of business in New York. More specifically, they do not report how many contracts involve a purely domestic transaction between two parties that reside in a single state, yet designate the courts of a different state to adjudicate disputes arising under the contract. However, it is the latter situation that is our principal focus here.

To gain insight into the latter issue, we examined contract cases that were filed in New York state courts between January 1, 2006 and December 31, 2006 and that were heard by one of the judges in the Commercial Division.<sup>151</sup> We focused on those cases where both the plaintiff and the defendant were, by their names, recognizable as legal entities such as corporations or limited liability companies. A total of 431 cases fit these criteria. Of those, 21 cases—or about 5% of the total—could be shown to involve two parties that were neither incorporated nor headquartered in New York. Five of these 21 cases—or about 1% of the total sample—involve a plaintiff and a defendant that were both from the same foreign jurisdiction.<sup>152</sup> Evidently, then, the

---

<sup>149</sup> Cf. Bach & Applebaum, *supra* note 108, at 152–60 (describing the creation of the commercial division and the motives behind that reform).

<sup>150</sup> Under § 5-1401 (1) of New York's General Obligations Law, the parties can select New York law to govern their contract even in the absence of a reasonable relationship to New York, if the contract involves at least \$ 250,000. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001). Further, the parties can litigate in New York if they have submitted to the jurisdiction of New York and chosen New York law to govern their contract, provided, however, that the proceeding must relate to a contract involving at least \$1,000,000. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2001). Delaware law takes a similar approach. It gives the parties to a contract the right to agree to the application of Delaware law if they are subject to the jurisdiction of Delaware courts and can be served with process. Any party to a contract that chooses Delaware law and in which the parties have submitted to the jurisdiction of Delaware's courts, may bring suit in Delaware. However, Delaware law restricts the scope of application of these rules to contracts involving at least \$ 100,000. DEL.CODE ANN. tit. 6 § 2708 (2007).

<sup>151</sup> We included only those cases for which a Request for Judicial Intervention has already been filed. Cf. 22 NYCRR § 202.6 (2007) ("At any time after service of process, a party may file a request for judicial intervention."). The Request for Judicial Intervention is a procedural device, a filed form through which the matter enters the court system database, and is generally a precondition to the matter being assigned to a Justice of the Supreme Court.

<sup>152</sup> Admittedly, these data have an important limitation. That is because the judges of the Commercial Division often have dockets that include non-commercial cases as well. Hence, the mere fact that a Commercial Division judge has handled a case does not necessarily imply that the case was handled by the Commercial Division. However, we have also examined the case type classifications provided by the New York court system's case database. These case type classifications are typically taken from the Request for Judicial Intervention forms, so the information contained therein may not always prove to be accurate. Keeping this in mind, an analysis of the relevant case type data shows that 75 cases were explicitly classified as Commercial Division cases. Out of these 75 cases, only one case could be shown to involve

New York courts are attracting some extraterritorial litigation from other states in the United States despite the generally high quality of courts throughout the U.S. At the same time, the overall amount of such litigation is as yet quite small.

Given that New York law and courts are evidently appealing to sophisticated commercial actors, it is unclear why New York is not attracting a larger amount of pure extraterritorial litigation. We suspect that a variety of factors are responsible. The costs of litigating at a distance remain a deterrent. Moreover, New York's Commercial Division, which is the most popular venue for important commercial litigation, was created only slightly more than a decade ago.<sup>153</sup> Local lawyers serving non-New-York clients may as yet be insufficiently familiar with New York law and practice to feel confident about choosing it over the local law and courts with which they have greater familiarity. (Delaware's dominance of corporate law in the United States has taken a century to build up, and remains incomplete.<sup>154</sup>) Finally, as we emphasize below, New York has at present only limited incentives to seek to attract purely extraterritorial litigation where the stakes are not large.<sup>155</sup> We expect that these obstacles will diminish with time, however, and that New York will continue to expand its role as a locus for commercial litigation from all over the United States, and ultimately from abroad as well.

## B. The European Union

As regards the volume of extraterritorial litigation within the European Community, there is no anecdotal or empirical evidence suggesting significant amounts of such litigation. Indeed, the hard data that do exist suggest that such litigation is at most a marginal phenomenon.

Data from Belgium are instructive in this context. Under Belgian law, the judgment creditor who seeks to enforce a foreign judgment generally needs to initiate legal proceedings to have the judgment declared enforceable.<sup>156</sup> While we have not been able to obtain the number of proceedings of this type,<sup>157</sup> the decision to declare a foreign judgment enforceable can be appealed to the *cour d'appel*,<sup>158</sup> and in 2005, the number of decisions handed down in cases where such an appeal was brought was

---

two parties that were neither incorporated nor headquartered in New York, whereas the other 74 cases involved at least one party that was incorporated or headquartered in New York.

<sup>153</sup> A pilot program was initiated in 1993. Bach & Applebaum, *supra* note 108, at 152. Due to the success of that pilot program, the Commercial Division was created in 1995. *Id.* at 153. The Commercial Division was expanded in 1998 and again in 2002. *Id.* at 154.

<sup>154</sup> Cf. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U.L. REV. 1559, 1571 (2002) (noting that Delaware's market share of IPO charters amounts to 56%).

<sup>155</sup> See *infra* Part X.A.1.

<sup>156</sup> Loi portant le Code de droit international privé [Law Containing the Code of Private International Law], July 16, 2004, Le Moniteur belge 1 (July 27, 2004), art. 23(1).

<sup>157</sup> The relevant proceedings are governed by §§ 1025–1034 of the Code Judiciaire. Loi portant le Code de droit international privé, July 16, 2004, art. 23(3)(1). While there are official statistics on the number of decisions handed down in such procedures, these statistics do not distinguish between exequatur and other proceedings. SERVICE PUBLIC FEDERAL JUSTICE, LES STATISTIQUES ANNUELLES DES COURTS ET TRIBUNAUX. ANALYSE DES STATISTIQUES DE LA PERIODE 1999–2005, 18 (2006) (on file with authors).

<sup>158</sup> See CODE JUDICIAIRE, Oct. 10, 1967, art. 1031.

0.05% of all appellate cases, or less than 79 in total.<sup>159</sup> Moreover, that number also includes those cases where the parties were from different Member States, suggesting that the number of cases where Belgians made use of foreign court in purely domestic transactions is minimal. Data from Germany<sup>160</sup> and Italy<sup>161</sup> paint a similar picture.

We suspect that the factors, just discussed, that have been responsible for inhibiting further extraterritorial use of New York courts in the United States are also at work in Europe. In addition, European lawyers that we have spoken to indicated that potential delays and complications in enforcement were a major obstacle to using courts from other member states.

### C. Among Fully Sovereign Nations

Internationally, there is even less reason to believe that extraterritorial litigation is presently a common choice in purely domestic disputes. Our data on the New York Commercial Division did not turn up a single case involving two parties from foreign countries. Nor do we find data from other countries that would lead us to believe that extraterritorial litigation is currently a common choice for purely domestic disputes. In part, this can be explained by the practical obstacles of the sort described above with respect to the United States and the European Community. In addition, however, the legal framework regarding jurisdiction and enforcement is hardly favorable to extraterritorial litigation at the international level.

## IX. Necessary Legal Reforms

How would the legal system have to change to allow for more extraterritorial litigation? Based on our earlier analysis, the specific steps that need to be taken are clear.

---

<sup>159</sup> Decisions handed down in exequatur proceedings amounted to 0.05% of all civil court of appeal decisions in 2005. SERVICE PUBLIC FEDERAL JUSTICE, LES STATISTIQUES ANNUELLES DES COURTS ET TRIBUNAUX. ANALYSE DES STATISTIQUES DE LA PERIODE 1999–2005, 16 (2006) (on file with authors). In the same year, the total number of decisions handed down by the civil branches of the courts of appeal was 134,439. *Id.* at 2. It follows that less than 79 decisions must have been rendered in exequatur proceedings.

<sup>160</sup> In Germany, the total number of proceedings seeking enforcement of a foreign judgment in 2004 was below 8883. STATISTISCHES BUNDESAMT, FACHSERIE 10 REIHE 2.1: RECHTSPFLEGE ZIVILGERICHTE 2004, 20, 46 (2006) (on file with authors). This number includes not just proceedings to enforce foreign judgments but also proceedings involving other titles that are not automatically enforceable. It is telling that 8883 proceedings constitute less than 0.3% of the overall total of 3,155,482 enforcement proceedings. *Id.* at 12. And, as in the case of Belgium, these 0.3% include cases where the parties are from different countries, meaning extraterritorial litigation in purely domestic cases must be extremely rare.

<sup>161</sup> The court in charge of declaring judgments from other Member States enforceable is the corte d'appello. Council Regulation, *supra* note 119, Annex II, at 1. Unfortunately, no statistics seem to be available regarding the exact number of the relevant proceedings. This said, in the judicial year 2005/2006, the number of decisions granting or denying recognition to foreign judgments must have been below 12,716, because that is the number of decisions not falling into any other of the listed categories. See Ministero della Justizia, Movimento dei procedimenti civili – Anno giudiziario 2005/2006: Dati nazionali, [http://www.giustizia.it/statistiche/statistiche\\_dog/2006/agcivile/nazionaleciv.xls](http://www.giustizia.it/statistiche/statistiche_dog/2006/agcivile/nazionaleciv.xls) (last visited February 22, 2008). Given that the overall number of civil proceedings filed in courts of general jurisdiction alone exceeded one million, *see id.*, it is clear that the vast majority of parties are litigating locally.

First, it has to be ensured that the jurisdiction conferred by forum selection clauses is respected—both by the court that has been chosen and by other courts. As pointed out above, this condition is met within the European Community and is largely met within the United States, but is not yet generally satisfied at the international level.<sup>162</sup>

Second, it must be possible for the parties to have the resulting judgment recognized and enforced in the origin state without incurring substantial delay or costs. That condition is clearly met within the United States. By contrast, as explained above, there is much room for improvement in the European Community, and the need for reform at the international level is even stronger.

Third, it must be ensured that parties can litigate in foreign courts without being forced to incur the inconvenience of having to travel there. The easiest way to do so is for courts to liberally allow the use of videoconferencing technology. At present, some countries—including the United States—are making steps in that direction. However, no jurisdiction currently seems to offer the parties the assurance that they will not have to appear physically in court.

Fourth, it would help if parties were able to litigate in the state of destination without incurring substantial additional legal expenses due to the need to employ an attorney in the host state. The easiest way to achieve this aim is for host states to go yet further in facilitating access to the bar by foreign lawyers, and to keep to a minimum the requisite involvement in litigation by members of the host state bar.<sup>163</sup>

Large steps toward accomplishing the first and second of these reforms could be taken by (a) widespread adoption of the Hague Convention on Choice of Court Agreements and (b) amendment of the Hague Convention to remove its limitation to international cases, so that its provisions extend as well to cases that are, except for choice of forum, purely domestic. At present, however, even the first of these steps, let alone the second, seems politically remote. Consequently, the more practical route at this point may be for potential host states to negotiate bilateral treaties with potential origin states that provide for mutual recognition of choice of forum clauses in commercial cases and for expeditious enforcement of judgments issuing from each other's courts.

Might such bilateral treaties—much less a multinational agreement like the Hague Convention—seem objectionable to potential host states on the grounds that they would compel the host state to enforce judgments governing host state citizens that are issued by weak and perhaps corrupt courts in other countries? So long as the treaties are limited to cases involving merchants, and do not cover consumer contracts or other contracts with unsophisticated individuals, there seems little reason for serious concern here. There is no reason to expect U.S. merchants to choose the courts of, say, India as a forum for contractual disputes if those courts are inferior to

---

<sup>162</sup> See *supra* Part VIII.

<sup>163</sup> In the extreme, host states might permit origin state lawyers to litigate in host state courts without demonstrating knowledge of host state substantive law in cases where the law chosen is that of the origin state—something that might be achieved by providing for limited admission to host state courts for foreigners who can simply demonstrate familiarity with host state procedural law.

those of the United States. Conversely, if the courts of Bangalore should develop to the point where they offer an attractive alternative to those of New York, they should surely be permitted to compete for the business of New York merchants.

## **X. Creating the Right Incentives**

Knowing which steps need to be taken is only of limited practical value if the chances that these measures will actually be adopted are slim. And at least at present, one has to acknowledge that some of the relevant steps are bound to be difficult to realize. Not just inertia but, as we have noted, strong protectionist forces in both host states and origin states inhibit reform.

Consequently, it is essential to focus on the bigger question of how jurisdictions can be motivated to take the necessary steps. How can local, federal, and international law create appropriate incentives for states to take the measures that are needed to promote extraterritorial litigation?

### **A. Potential Motives to Attract Foreign Litigants**

To address this question, we focus first on the existing incentives that states might have to attract foreign litigants.

#### **1. *Procuring Business for Lawyers and Other Local Services***

An obvious motivation for making local courts attractive to foreign litigants is to procure business for the local bar and for other purveyors of services in the host state, such as restaurants and hotels. Indeed, this incentive seems to be at work in New York. While that state's self-conscious efforts to make its substantive contract law and its courts attractive to commercial litigants<sup>164</sup> might be, at least in part, designed to make New York State an attractive place for businesses to locate, New York's statutory guarantee to recognize of willingness to accept the jurisdiction conferred by a choice of forum clause in any contract with more than \$1 million at stake<sup>165</sup> is clearly intended to attract litigation from outside the state. And the incentive for that, in turn, is to obtain business for New York lawyers and other local services. Evidently New York believes that, when the stakes are over \$1 million, the costs of providing subsidized judicial services are more than balanced by the revenue to local professionals and merchants (and tax revenues to the state) that the litigation throws off. Similarly, the corporate law literature has long argued that one incentive for jurisdictions to compete for corporate charters is to increase the volume of litigation before local courts, thereby generating business for local lawyers.<sup>166</sup>

While this incentive has the desirable effect of moving some jurisdictions to open their courts to foreign litigants, it also has serious drawbacks.<sup>167</sup> To begin with, it is

---

<sup>164</sup> See *supra* Part VIII.A.

<sup>165</sup> See note 150 *supra*.

<sup>166</sup> E.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443 (1992); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240—41 (1985).

<sup>167</sup> See *infra* Part VII.C.

not clear how powerful this incentive really is. The fact that New York law only guarantees the recognition of choice of forum clauses if the contract is worth at least \$1 million suggests that the desire to attract business for local services only offers an incentive to attract extraterritorial litigation in which the stakes are conspicuously high. A similar conclusion is suggested by experience with corporate litigation in Delaware. Delaware is currently the preeminent forum for high-stakes corporate litigation,<sup>168</sup> and Delaware law ensures the involvement of local lawyers in such litigation, *inter alia* by requiring that all filings be signed off by members of the Delaware bar.<sup>169</sup> Yet Kahan and Kamar find that the additional income that Delaware attorneys derive from Delaware's leading position in the charter market is relatively limited if one compares it to the income that Delaware derives from franchise fees.<sup>170</sup>

Even more importantly, the desire on the part of host states to generate business for the local bar is bound to harm the prospects for extraterritorial litigation in important respects. In part, the reason lies on the side of the host state. To procure business for the local bar, states have every reason to insist that plaintiffs who use their courts make extensive use of lawyers in the host state. The result is a disincentive to ease bar admission requirements for foreigners, or to adopt virtual courtrooms and other technologies that will obviate the need for parties, witnesses, and origin state lawyers to travel to the host state for consultations, depositions, and appearances in court.

But there also is a problem involving states of origin. Their cooperation is central to the success of extraterritorial litigation since it is they that will eventually have to recognize and enforce the judgment. Yet to the extent that the parties are forced, directly or indirectly, to make extensive use of attorneys and other law-related services in the host state, extraterritorial litigation comes at the expense of lawyers and law-related services in the origin states. Consequently, origin states are given an incentive to minimize the amount of extraterritorial litigation. It follows that if the market for extraterritorial litigation is to succeed, it must be possible for the litigants to rely chiefly on lawyers in the states of origin. That goal is unlikely to be reached if

---

<sup>168</sup> Yan Leychik, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 229 (2006) (noting that the Delaware Chancery Court "has become a preeminent forum for corporate litigation"); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (noting the "national preeminence [of the Delaware state court system] in the field of corporation law"). Cf. ROMANO, GENIUS, *supra* note 62, at 41 (reporting that 29 out of a sample of 35 shareholder lawsuits that involved Delaware law and could have been filed either in Delaware or in federal courts were filed in Delaware); Maurice A. Hartnett, III, *The History of the Delaware Court of Chancery*, 48 BUS. LAW. 367, 370 (1992) (calling Delaware "a nationally recognized forum for the trial of corporate litigation").

<sup>169</sup> Del. Sup. Ct. R. 12 (a); Del. Ch. Ct. R. 170 (d).

<sup>170</sup> Cf. Kahan & Kamar, *supra* note 30, at 697–98 (estimating the additional income that Delaware's lawyers derived from Delaware's leading position in the charter market to have been \$227 million in 2001 and noting, by way of comparison, that "[a]ll of Delaware's additional legal business is thus equivalent to that of a single large non-New York law firm"). In the same year, Delaware took in around \$586 in franchise taxes. U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS: 2001 (REVISED APRIL 2003), available at <http://www.census.gov/govs/statetax/0108destax.html>.

the desire to generate services for the host state's bar is the principal reason why host states compete for litigants.

## 2. *Altruism*

Some jurisdictions might also be led to open their courts to wholly foreign cases by altruistic motives.<sup>171</sup> More generally, leading commercial nations could reasonably conclude that an effective way to aid developing countries is to assist merchants from those countries in gaining access to the donor nation's domestic commercial courts. Altruism is, however, surely too thin a reed to support major efforts by potential host countries.

## 3. *Court Fees*

A third motive to attract foreign litigants is to obtain revenues for the state by charging fees that equal or exceed the cost of providing judicial services.

State revenues, in the form of annual franchise fees for registering corporations, have long been the conspicuous motive for the state of Delaware to maintain a body of corporate law and specialized courts that attract out-of-state firms.<sup>172</sup> In theory a similar approach could be taken to contracts: a host state could require, as a condition for granting jurisdiction under a choice of forum clause in a purely foreign case, that the underlying contract have been registered in the host state, and an appropriate fee paid, at the time the contract was entered into. Yet this seems impractical. It would require a transaction, and associated costs, even for the overwhelming majority of contracts that never end up in court; a workable formula for setting fees would be extremely elusive; and—because the fees would inevitably be distortionary—there would surely be room for substantial adverse selection, with registered contracts

---

<sup>171</sup> Altruistic motives may be part of the reason why the United Kingdom still maintains the Privy Council which functions as the highest court of appeal for certain Commonwealth countries. For a description of the role of the Privy Council see Stefan Voigt, Michael Wilhelm Ebeling, & Lorenz Blume, *Improving Credibility by Delegating Judicial Competence – The Case of the Judicial Committee of the Privy Council*, 82 J. DEVELOPMENT ECON. 348, 355–58 (2007). Of course, another potential explanation lies in the desire to prevent a certain uniformity of law across Commonwealth countries—a uniformity from which the United Kingdom, too, stands to profit.

<sup>172</sup> It is generally recognized that the quality of Delaware's judiciary is an important factor in attracting corporations to Delaware. See, e.g., Bebchuk & Hamdani, *supra* note 58, at 580–81 (pointing out that Delaware's institutional infrastructure, including its chancery court, “is an important component of the quality of the system offered by Delaware”); Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 IOWA J. CORP. L. 99, 106 (2004) (noting that the Chancery Court constitutes an “important advantage of Delaware” in the market for corporate charters). Cf. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911 (1998) (noting that the proficiency of Delaware courts is widely acknowledged to be a competitive advantage). Further, there is widespread agreement that franchise taxes are the main incentive for Delaware to compete for corporate charters. For example, for the year 2001, Marcel Kahan and Ehud Kamar have estimated that the additional revenues that Delaware lawyers had as a result of Delaware's leading position in the charter market amount to around \$227 million. Kahan & Kamar, *Myth*, *supra* note 30, at 697 (noting that “most private firms incorporate in their respective home states or seek an alternative organizational form”). By contrast, the income that the state of Delaware derived from franchise taxes in the same year was around \$600 million. U.S. Census Bureau, Delaware State Government Tax Collections: 2001 (2002), <http://www.census.gov/govs/statetax/0108destax.html>.



tending to be just those in which the parties believe that the potential for litigation is greatest.

Rather, the most workable source of state revenue from extraterritorial litigation consists of ordinary court fees—that is, user fees charged to the litigants in the course of litigation. At present, however, court fees in potential host states generally fail to cover the state’s costs. While it is difficult to determine the exact size of costs and revenues, there is widespread agreement that U.S. courts are subsidized.<sup>173</sup> Consequently, court fees currently provide an incentive against rather than in favor of attracting foreign litigants. Nor is this situation idiosyncratic to the United States. While some countries charge higher court fees than the United States,<sup>174</sup> the general tendency is to either subsidize courts or, at most, to provide judicial services at cost.<sup>175</sup>

There is of course a justification for subsidizing courts. Litigation creates positive externalities in the form of precedents that benefit third parties.<sup>176</sup> Moreover, the presence of an effective court system that will enforce obligations creates an incentive to honor those obligations without the need for litigation. In particular, as we have observed above, the presence of effective contract enforcement creates great benefits for merchants in general by permitting them to make, and to receive, credible

---

<sup>173</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 115 n.158 (2005); Arturo Bris, Alan Schwartz, & Ivo Welch, Who Should Pay for Bankruptcy Costs?, 34 J. LEGAL STUD. 295, 330 n.18 (2005) (pointing out that “[i]n the real world, the government subsidizes the court system”); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 51 (1987) (stressing that “[c]ourts are subsidized”); Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 689 (2001) (“The court system is subsidized by society.”); William S. Dodge, *The Case of Punitive Damages in Contracts*, 48 DUKE L.J. 629, 675 (1999) (referring to “the publicly subsidized court system”); Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736 (2006) (pointing out that the court system is subsidized by the government); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL’Y REV. 573, 583 (2005) (“The public subsidizes courts.”); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 303 (noting that “[c]ourts are subsidized”); Jaime Pieras, Jr., *Commentary: Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 CATH. U.L. REV. 943, 943–44 (1986) (referring to “[o]ur present system of subsidized courts, in which the fees paid by the litigants do not cover the cost of the service provided to them”); Eric J. Conn, Note, *Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes*, 86 VA. L. REV. 1537, 1575 n.118 (2000) (noting that are courts “are subsidized by public revenues”).

<sup>174</sup> See, e.g., Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 816 (2003) (noting that “[i]n most other countries, beginning a lawsuit is much more costly” than in the United States).

<sup>175</sup> Cf. Robert Dingwall & Emilie Cloatre, *Vanishing Trials? An English Perspective*, 2006 J. DISP. RESOL. 51, 67 (2006) (noting that “successive U.K. governments have, since the early 1980s, determined that the full costs of providing a civil justice system should be met by its users through court fees” and that “[t]his policy appears to be unique among major developed countries, including the rest of Europe and the U.S.”). Cf. also Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT’L ARB. 451, 465 (2000) (noting that “governments ordinarily subsidize court systems, with the plaintiff paying only a small filing fee”).

<sup>176</sup> E.g., Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1597 n.402 (2000); Landes & Posner, *supra* note 46, at 236.

commitments. Indeed, the more effective a judicial system is, the less likely it is to be used. As a consequence, it makes sense to support a judicial system by levying taxes on all those who are subject to its jurisdiction, and not simply by fees levied on litigants.

It is not possible, however, to charge taxes to potential litigants who have no other contacts with the host state. If a state is to have an incentive to accept such litigants, it must therefore be able to charge them court fees that are higher than those charged litigants from the host state—preferably, in fact, fees high enough to generate a surplus for the state.

## **B. Restrictions on Differentiated Court Fees**

At present, law and legal culture generally prevent courts from imposing higher fees on foreign litigants than on local litigants. This is, we believe, a mistake as it applies to extraterritorial litigation, and calls for reform.

Though we are most concerned with the fully international context, the law in this area is, as in other respects, most clearly developed within the federated systems of the United States and the European Union. For this reason, we focus most intensely on those federations. We also focus on them because they contain some of the most prominent potential host states, and because their legal cultures have substantial influence throughout the world. Only if the United States and the European Union accept differentiated systems of court fees are such fee structures likely to achieve broad international acceptance.

### **1. The United States**

We consider first the situation within United States. While there are no U.S. statutes or cases that are directly controlling, existing precedent can be read as precluding the states, on Constitutional grounds, from imposing higher fees on litigants from other states within the United States.

#### **a. The Commerce Clause**

To begin with, existing case law suggests that differentiated fees might be found to violate the (dormant) Commerce Clause, which “directly limits the power of the States to discriminate against interstate commerce.”<sup>177</sup>

To be sure, the Supreme Court has long held that this stricture does not apply where states themselves enter the market<sup>178</sup> as a seller<sup>179</sup> or buyer<sup>180</sup> of goods or services. In that context, states are free to favor their own citizens. For example, although the Supreme Court has never ruled directly that the dormant Commerce Clause does not bar discrimination in tuition against out-of-state students at public

<sup>177</sup> *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

<sup>178</sup> *Id.* at 277; *Western Oil & Gas Assoc. v. Cory*, 726 F.2d 1340, 1342 (9<sup>th</sup> Cir. 1984).

<sup>179</sup> *E.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (sale of cement).

<sup>180</sup> *See, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (State, under a plan to pay a bounty for the destruction of vehicles formerly titled in that state, discriminated between in-state and out-of-state processors of scrap vehicles.).

educational institutions, “[t]here are . . . strong indications that the Court would find no commerce clause problem if the question were squarely presented.”<sup>181</sup> Indeed, given that more than three quarters of U.S. higher education is provided by state universities,<sup>182</sup> and that these universities have for many decades followed a practice of charging out-of-state students much higher tuition than that charged students from within the state, a finding of unconstitutionality seems improbable.

There are important parallels between higher education and adjudication of commercial disputes. Both are supplied principally by the government, but are also supplied in meaningful degree by private providers. And both are essentially private services—in the sense that their benefits are confined to their recipients rather than the broader public—at least when supplied to persons from outside the jurisdiction.<sup>183</sup>

However, the Supreme Court has indicated that the market participant exemption does not apply where a state acts “in its distinctive governmental capacity” rather than “in the more general capacity of a market participant.”<sup>184</sup> And the work of state courts is likely to be seen as a distinctly governmental activity.<sup>185</sup> Moreover, the Supreme Court has long held that the Commerce Clause bars discrimination against nonresidents in user fees<sup>186</sup> such as fees paid for the use of state waterways,<sup>187</sup> state highways,<sup>188</sup> or government-owned airports.<sup>189</sup> One prominent commentator has suggested reconciling these results with the market participant exemption by understanding the user fee exemption to be limited to differentiated fees imposed for

---

<sup>181</sup> Dan T. Coenen, *State User Fees and the Dormant Commerce Clause*, 50 VAND. L. REV. 795, 806 n.60 (1997) (collecting lower federal court cases upholding tuition discrimination against Commerce Clause challenges and Supreme Court cases upholding tuition discrimination against other constitutional challenges).

<sup>182</sup> See Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Services*, in INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG TERM CARE IN AMERICA 245, 267 tbl 9.2 (Victor R. Fuchs, ed., 1996).

<sup>183</sup> The most compelling justification for the large role of government in supplying higher education is not that it generates important public benefits beyond the very substantial private benefits it confers on the students themselves, but rather that severe imperfections in the private market for loans to finance the accumulation of human capital necessitate financing education for all but the most prosperous students through government sources or through private donations. See Henry Hansmann, *The Role of Nonprofit Enterprise*, 80 YALE L.J. 835, 860-62 (1980); Hansmann, *supra* note 182, at 264.

<sup>184</sup> *New Energy Co.*, 486 U.S. at 277.

<sup>185</sup> Thoughtful analysis might, however, support the conclusion that adjudication involves several functions, some more governmental than others. In particular, where contracts are involved, deciding who is in the right – basic dispute resolution – arguably is not a distinctly governmental activity; arbitrators can easily do it too. On the other hand, enforcement is ultimately something that only the state can do effectively, with its monopoly on force. Hence arbitrators must rely on courts to enforce their judgments. When a foreign court decides a domestic contract dispute, the foreign court is acting like an arbitrator, largely limiting its role to declaring which party is in the right. Hence, one might argue, the foreign court is not acting in its distinctive governmental capacity. Rather, it is the courts of the origin state that must enforce the judgment, and hence those courts that are performing a distinctly governmental function.

<sup>186</sup> An excellent review of the relevant case law is given by Coenen, *supra* note 181, at 805-823.

<sup>187</sup> *Guy v. Balt.*, 100 U.S. 434, 443 (1880).

<sup>188</sup> *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 501-503 (1947).

<sup>189</sup> *Northwest Airlines v. County of Kent*, 510 U.S. 355, 369 (1994).

the use of the “infrastructure of interstate trade.”<sup>190</sup> Yet, even accepting this interpretation, courts might be considered functionally part of the infrastructure for interstate trade, and hence barred from charging foreigners differentiated fees.

Assuming that differentiated court fees in the area of commercial contracting are subject to scrutiny under the commerce clause, the question remains whether the states can justify them. This would require states to show that differentiated fees “advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>191</sup> In the context at hand, one might be tempted to argue that the host state has to impose differentiated fees in order to protect itself from having to subsidize judicial services for foreigners at the expense of local taxpayers. However, it is unlikely that this reasoning is consistent with existing precedent. To be sure, the Supreme Court has acknowledged that “[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden[s].”<sup>192</sup> Yet the Court has applied this exception very narrowly, requiring among other things that “the events on which the interstate and intrastate taxes are imposed must be ‘substantially equivalent.’”<sup>193</sup> And according to the Court, that condition is not met where a differentiated fee is imposed to compensate for the fact that certain services are partially financed via the general taxes imposed on residents.<sup>194</sup> Accordingly, it is unlikely that differentiated court fees can be justified by pointing out that the court system is at least to some degree financed by the jurisdiction’s residents via taxes. A fortiori, there is no reason to believe that the Supreme Court would accept differentiated fees that allow the host state to turn a profit at the expense of foreign litigants.

Of course, one might be tempted to make the following objection: All states recognize the *forum non conveniens* doctrine<sup>195</sup> which allows courts to decline to exercise jurisdiction if the forum is inconvenient.<sup>196</sup> Moreover, the Supreme Court has made it clear that it considers the *forum non conveniens* doctrine constitutional.<sup>197</sup> But if the courts of the host state can entirely refuse to adjudicate cases that have no connection with the host state, does this not imply that they must all the more be able to take the much less drastic step of charging the parties higher fees in such cases?

---

<sup>190</sup> See Coenen, *supra* note 181, at 805-823.

<sup>191</sup> *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 101 (1994).

<sup>192</sup> *Id.* at 102 (citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

<sup>193</sup> *Id.* at 103 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)).

<sup>194</sup> *Id.* at 104.

<sup>195</sup> E.g., Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 87 n.15 (1998); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1617 (1992); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 836 (1999); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement after Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 372 n.63 (1993).

<sup>196</sup> See, e.g., George, *supra* note 195, at 821 (pointing out that “forum non conveniens allows a forum to dismiss an action that is significantly inconvenient for a defendant”); Heiser, *supra* note 195, at 394 (noting that the *forum non conveniens* doctrine “permits a court to decline to exercise its jurisdiction if the forum chosen by the plaintiff is a seriously inconvenient place to conduct the litigation”).

<sup>197</sup> *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935) (noting that a state “may in appropriate cases apply the doctrine of *forum non conveniens*”).

The answer is no. The goals of the forum non conveniens doctrine are to protect the defendant from having to litigate in an inconvenient forum as well as to promote certain public interests.<sup>198</sup> The latter include avoiding administrative difficulties, making it easier for interested third parties to follow the unfolding of the trial, and ensuring that a state's residents are not burdened with jury duty for cases that have no ties to the state.<sup>199</sup> The forum non convenience doctrine can potentially serve all of these goals, yet none of them can be invoked to justify differentiated fee structures. Moreover, the forum non conveniens doctrine is rarely invoked where, as in the cases at issue, the parties have used a forum selection clause to specify the forum *ex ante*.<sup>200</sup> Thus, recognition of the forum non conveniens doctrine, as it has been deployed, is not necessarily inconsistent with barring higher fees for foreign litigants.

Despite unfavorable precedent, however, the dormant Commerce Clause is not an insuperable obstacle to differentiated fee structures. Rather, it is always within the power of Congress to authorize such fee structures by statute. The dormant Commerce Clause doctrine applies only in the absence of congressional action: “[A]ny action undertaken by a state within the scope of . . . congressional authorization is rendered invulnerable to Commerce Clause challenge.”<sup>201</sup> We expand further on the case for authorization below.<sup>202</sup>

## **b. The Privileges and Immunities Clause**

Differentiated court fees also face a second constitutional hurdle<sup>203</sup> in the form of the Privileges and Immunities Clause, which “secures the right of the citizens of one [s]tate . . . to resort to the courts of another, equally with the citizens of the latter [s]tate.”<sup>204</sup> Yet with respect to differentiated fee arrangements in particular, the Court has made it clear a state “is not without power . . . to charge non-residents a differential which would merely compensate the State for any added . . . burden they may impose or for any . . . expenditures from taxes which only residents pay.”<sup>205</sup> Hence, higher court fees for non-residents are consistent with the Privileges and Immunities Clause so long as they are necessary to protect free-riding at the expense of the state's taxpaying residents. Fees for nonresidents that are above cost, and hence produce a profit for the state, might be more difficult to justify under existing

<sup>198</sup> *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>199</sup> *Id.* at 508—09.

<sup>200</sup> *See supra* note Part VIII.A.

<sup>201</sup> *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

<sup>202</sup> *See infra* Part X.C.

<sup>203</sup> The Equal Protection Clause presumably would not be violated by federal legislation allowing differentiated court fees. Where federal law discriminates between U.S. residents and non-residents, none of the suspect classifications are involved. Moreover, the desire to create a workable market for judicial services would presumably qualify as a sufficient reason for the discrimination.

<sup>204</sup> *Missouri P. R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922). *Accord*, *McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934) (holding that states are required “to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens”).

<sup>205</sup> *Toomer v. Witsell*, 334 U.S. 385, 398 (1948). *See also* *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (“[T]he state must demonstrate that ‘(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective’ ....”).

precedent.<sup>206</sup> But the Privileges and Immunities Clause does not protect corporations<sup>207</sup> and thus would allow differentiated fees for the litigants who would benefit the most from extraterritorial litigation.

## 2. Europe

Among the member states of the European Community, the constitutional obstacles to differentiated court fees are similar, though more severe. Article 12 of the Treaty Establishing the European Community contains a general prohibition of discrimination on the basis of nationality<sup>208</sup>—a prohibition that also comprises covert forms of discrimination such as discrimination on the basis of residence.<sup>209</sup>

While the European Court of Justice has not directly addressed the issue, there is little reason to believe that differentiated court fees would be sustained. To be sure, the relevant prohibitions on discrimination are not absolute. At least when it comes to those cases where the law discriminates on the basis of residence rather than explicitly discriminating on the basis of nationality, it is generally recognized that the relevant measures will pass muster if they can be justified on objective grounds.<sup>210</sup> Hence, one might once again be tempted to argue that the need to avoid free-riding as well as the benefit of encouraging jurisdictions to compete as providers of judicial services justifies the imposition of a differentiated fee structure.

However, in the past, the Court of Justice of the European Communities has shown little appetite for this type of reasoning. While it has not yet addressed differentiated court fees, its case law on discriminatory fees for educational services

---

<sup>206</sup> In *Toomer*, the Court demanded that there be “a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.” *Toomer*, 334 U.S. at 399. Failure to make a profit might be hard to justify as a “danger.”

<sup>207</sup> *E.g.*, *Philadelphia Fire Assoc. v. N.Y.*, 119 U.S. 110, 117 (1886); *Liverpool Ins. Co. v. Mass.*, 77 U.S. 566, 573 (1871); *Paul v. Va.*, 75 U.S. 168, 177 (1869).

<sup>208</sup> Consolidated Version of the Treaty Establishing the European Community art. 12, Dec. 24, 2002, 2002 O.J. (C 325) 25-26 [hereinafter EC-Treaty].

<sup>209</sup> *E.g.*, Case C-65/03, *Commission v. Belgium*, 2004 E.C.R. I-6427 at ¶ 28.

<sup>210</sup> This is true, first, for the general prohibition of discrimination on grounds of nationality enshrined in article 12 of the EC-Treaty. *See, e.g.*, Case C-29/95, *Eckehard Pastoors & Trans-Cap GmbH v. Belgium*, 1997 E.C.R. I-285, at ¶ 18-19 (noting that national legislation discriminating based on residence, while having “the same practical result as discrimination on grounds of nationality,” is not sufficient for legislation to be held incompatible with the general prohibition of discrimination and that for a violation to be found “it would also be necessary for the legislation in question to be incapable of being justified by objective circumstances”); Case C-398/92, *Mund & Fester v. Hatrex Internationaal Transport*, 1994 E.C.R. I-467, at ¶ 16-17 (noting that the general prohibition on discrimination on grounds of nationality “forbids not only overt forms of discrimination based on nationality, but also all covert forms of discrimination,” but holding that a violation of the prohibition of discrimination occurs only in those cases where “the provision in question [is] not . . . justified by objective circumstances.”). Within the context of the fundamental freedoms, the treaty makes it clear that even overly discriminating measures can sometimes be justified. *See, e.g.* TEC, art. 30 (listing grounds that justify restrictions of the free movement of goods). Moreover, as far as those measures are concerned that do not overly discriminate on the basis of nationality, the Court of Justice of the European Communities has held that such measures can be justified by objective circumstances. *See, e.g.*, Case C-204/90, *Hanns-Martin Bachmann v. Belgium*, 1992 E.C.R. I-249 ¶¶ 9, 28 (finding de-facto discrimination, yet concluding that the national measure at issue is nonetheless justified).

is telling: As a general rule, the Court has held that higher fees for university students from other member states are unlawful.<sup>211</sup> Admittedly, the court has indicated that discrimination might be permissible to avoid extreme financial burdens.<sup>212</sup> However, it is not apparent that extra-territorial litigation would ever reach that level. Moreover, there is nothing to suggest that the Court would approve higher fees for litigants from other member states that are intended to yield a profit.

In the European Union, however, as in the United States, a federal intervention—in the form of an EC-regulation allowing differentiated court fees—is likely to solve the problem. To be sure, the EC-Treaty prohibits not only the States but also the Community itself from discriminating on the grounds of nationality.<sup>213</sup> However, that does not mean that Community legislation of the type at issue would necessarily be held to violate the Treaty. It needs to be recalled, in this context, that the relevant prohibitions on discrimination are not absolute. Admittedly, as explained above, such objective grounds are very unlikely to be found where the measures at issue are brought about by member state legislation. However, it is crucial to note that the European Court of Justice, in applying the principle of non-discrimination, tends to be

---

<sup>211</sup> The leading case on discriminatory fees is *Gravier v. City of Liège*, Case 293/83, Françoise Gravier v. City of Liège, 1985 E.C.R. 593, in which a student of French nationality who sought to study at a Belgian University objected to a rule under which he was to pay an enrollment fee although no equivalent fee was demanded from students of Belgian nationality. Despite the fact that public education was subsidized by the Belgian taxpayers and the Belgian government invoked the need to compensate for this burden, the Court held that a rule which imposes a fee on foreign students while failing to impose the same fee on students with the citizenship of the relevant member state amounted to an illegal discrimination on the basis of nationality. *Id.* at ¶ 26. See also Case C-147/03, *Commission v. Austria*, 2005 E.C.R. I-5969 ¶ 76 (holding that Austria must grant non-Austrian holders of secondary education diplomas the same access to higher and university education as holders of secondary education diplomas awarded in Austria, despite Austria's claim that the resulting free-rider problems would overburden its educational system).

<sup>212</sup> See Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2119 ¶¶ 56-57 (categorizing as justified a residence requirement for subsidized loans given to students by the U.K. to cover maintenance costs, on the grounds that otherwise the subsidies could become an unreasonable burden and reduce the overall level of assistance granted by the state, while also stressing the illegality of a rule that would deny such loans even to those students who had – even if only in their capacity as students – been residing long enough in the U.K. to achieve the relevant level of integration into U.K. society).

<sup>213</sup> This is particularly true for the general prohibition of discrimination on grounds of nationality that is enshrined in article 12 of the EC-Treaty. See Case 313/86, *O. Lenoir v. Caisse d'allocations familiales des Alpes-Maritimes*, E.C.R. 1988, 5391 ¶¶ 14–15 (making it clear that the principle of non-discrimination applies to Community legislation). In addition, though, it should be noted that the so-called fundamental freedoms (the free movement of goods, the free movement of workers, the free movement of capital, the freedom of establishment, and the freedom to provide services) are also interpreted to contain prohibitions of discrimination. This matters, because the free movement of good has long been held to apply not only to measures taken by member states, but also to acts of the European Community. *E.g.*, Case C-51/93, *Meyhui NV v. Schott Zwiesel Glaswerke AG*, E.C.R. 1994, I-3879 at ¶ 11; Case C-169/99, *Hans Schwarzkopf GmbH & Co. KG/Zentrale zur Bekämpfung unlauteren Wettbewerbs eV.*, ECR 2001, I-5901 at ¶ 37; Case C-284/95, *Safety Hi-Tech Srl v. S. & T. Srl.*, ECR 1998, I-4301 at ¶ 63; Case C-114/96, *Criminal Proceedings against René Kieffer & Romain Thill*, Slg. 1997, I-3629 at ¶ 27; Case 15/83, *Denkavit Nederland BV/Hoofdproduktschap voor Akkerbouwprodukten*, ECR 1984, 2171 at ¶ 15.

much more lenient where EC legislation is concerned.<sup>214</sup> In fact, to this date, there does not appear to have been a single case where the Court of Justice has found Community legislation to be invalid on the grounds that it violated the principle of non-discrimination.

Against this background, it seems plausible that Community legislation allowing higher court fees in purely foreign cases—i.e. cases involving two parties domiciled outside the forum state—would pass muster under the EC Treaty. After all, as explained above, even when it comes to member state legislation, the Court has indicated that it sees certain limits on the duty of member states to provide public services to non-residents. Moreover, as explained in this article, there are very sound reasons for giving the member states an incentive to compete for litigants by allowing them to charge higher fees in purely foreign cases. Accordingly, given the more generous standard of scrutiny that applies to Community legislation, a regulation that allows for higher court fees in case of purely foreign cases ought to escape a verdict of illegality.

### 3. *Globally*

Even at the global level, differentiated court fees face hurdles of two types. First, bilateral treaties often prohibit discrimination vis-à-vis foreign litigants. For example, the United States has concluded so-called Treaties on Friendship, Navigation, and Commerce with dozens of countries.<sup>215</sup> These treaties typically contain provisions granting the nationals of the other country a right to access the courts on the same terms as the relevant country's own nationals.<sup>216</sup> This does not lead to problems if fee discrimination is permitted among states within the United States. If the New York courts can charge higher fees for litigants from Texas, then doing the same thing for litigants from India does not involve discriminatory treatment. If, however, fee discrimination within the United States is barred, existing treaties would have to be amended to permit U.S. states to establish differentiated fees. This is not a trivial obstacle, but neither should it be insuperable.

Second, federal law also sometimes prevents states from discriminating vis-à-vis alien litigants. To be sure, the EU antidiscrimination rules do not prohibit unequal treatment of persons from non-member states.<sup>217</sup> And, as regards the U.S. constitution, it is well established that the Privileges and Immunities Clause does not

---

<sup>214</sup> Cf. TAKIS TRIMIDAS, *THE GENERAL PRINCIPLES OF EC LAW* 98 et seq. (1999) (analyzing differences in the standards of scrutiny); MIGUEL POIARES MADURO, *WE, THE COURT: THE EUROPEAN COURT OF JUSTICE & THE EUROPEAN ECONOMIC CONSTITUTION* 77—78 (1998).

<sup>215</sup> See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, U.S.-Isr., Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, U.S.-Japan, Apr. 2, 1953, U.S.T. 2063, T.I.A.S. No. 2863.

<sup>216</sup> See, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-F.R.G., art. VI (1), Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593 (imposing a duty to grant “national treatment with respect to access to the courts of justice”).

<sup>217</sup> Case T-333/00, *Rougmarine SARL v Commission*, 2002 E.C.R. II-2983 at ¶ 38.



protect aliens.<sup>218</sup> However, the Commerce Clause is not restricted to commerce “among the several states.” Rather, the Commerce Clause also extends to commerce “with foreign nations.”<sup>219</sup> Accordingly, the Supreme Court has made it clear that the Dormant Commerce Clause Doctrine, too, applies to state regulation interfering with foreign commerce.<sup>220</sup> Indeed, the relevant case law suggests the standard of review to be applied in this context is even stricter than when it comes to commerce between U.S. states.<sup>221</sup> Yet here, just as among the states within the United States, a federal statute will suffice to permit differentiated fees.

### C. A Change in Legal Culture

Globalization of commercial litigation can and will continue to expand even if host state courts are constrained to charge foreign litigants fees no greater than those charged domestic litigants. As explained above, however, differentiated fees are indispensable if jurisdictions are to make themselves hospitable to foreign litigants in more than just the largest and financially most profitable cases. Is that objective worth limiting the constitutional principle of formal non-discrimination in access to the courts? In our view it is, and the reasons are straightforward..

To begin with, there is little risk that such a step would make foreign litigants worse off. Or at least that is true if, as we suggest, differentiated fees are permitted only in what we have called purely foreign cases—that is, cases that are litigated between foreign litigants and that do not have any substantial ties to the forum. The existing regulatory framework essentially precludes most such cases from being tried extraterritorially. If, as we expect, the ability to charge competitive court fees motivates at least some jurisdictions to compete vigorously for foreign litigants, then it should become much simpler for such litigants to engage in extraterritorial litigation than it is now. Consequently, foreign litigants have little to lose and much to gain from the reform we suggest.

---

<sup>218</sup> E.g., *Zobel v. Williams*, 457 U.S. 55, 74 (O'Connor, J., concurring); Donald E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 814 n.67 (1988); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 510-11 (2007); Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges and Immunities Clause Portend the Future—or Reveal the Structure of the Present*, 113 HARV. L. REV. 110, 193 n.353 (1999). Cf. also *Paul v. Va.*, 75 U.S. 168, 177 (1869) (“The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State . . . .”) (dictum).

<sup>219</sup> Accordingly, the Supreme Court has repeatedly held that the states “cannot by legislation place burdens upon commerce with foreign nations or among the several States.” E.g., *Sherlock v. Alling*, 93 U.S. 99, 102 (1876); *Smith v. Alabama*, 124 U.S. 465, 473—74 (1888).

<sup>220</sup> E.g., *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 310—11 (1994). Cf. J.T. Hutchens, Note, *The Market-Participant Exception and the Dormant Foreign Commerce Clause*, 5 Cardozo Pub. L. Pol’y & Ethics J. 445, 445 (2007) (noting that “the Court has imposed the strictures of the Dormant Commerce Clause on state regulation of foreign trade”).

<sup>221</sup> The Supreme Court has held that that the protection afforded to international commerce is even “broader than the protection afforded to interstate commerce.” *Kraft Gen. Foods v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 79 (1992). Similarly, the Court has invoked the need for federal uniformity to explain why, when it comes to foreign rather than interstate commerce, “a State’s power is further constrained.” *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 311 (1994).

The present system essentially reserves the ability to litigate in foreign courts to parties involved in cases with extremely high stakes. They alone have guaranteed access to New York courts. And only for them is it worthwhile to overcome the various obstacles that render extraterritorial litigation impractical for the great majority of litigants. By allowing differentiated court fees, one can give states the incentive to make extraterritorial litigation feasible for more than just the elite. In other words, the reforms we suggest, while allowing de-jure discrimination, are an important step towards creating de facto equality in access to justice between different classes of litigants.

Constitutional doctrine on nondiscrimination in judicial services has developed primarily among the federated states of the United States and the European Union, in which a substantial degree of reciprocity among the member states can be relied upon both because of the homogeneity of those states and because they interact within an overarching framework of governance. We believe that constraints on differentiated fees are counterproductive even within those federations and should be relaxed. The constraints are less costly there than in the fully international setting, however. Consequently, constitutional constraints on court fees that have been developed within the United States and the EU should not be taken as a guide to the principles that should apply among fully independent nations. And, if either or both of those federations are not prepared to relax their own internal constraints on differentiated court fees, they should nonetheless refrain from extending those constraints to their member states' treatment of litigation that comes from outside the federation.

## **XI. Conclusion**

Good courts are central to sustained economic development. Yet, in many jurisdictions around the world, courts are slow, inept, or corrupt. In this article, we suggest that one way of mitigating this problem is to let parties from countries with weak courts litigate in jurisdictions where the courts are much stronger. Important technological developments, including rapid advances in transportation and telecommunications, are today creating an environment in which such a global market for judicial services seems entirely feasible. There are compelling reasons to believe that the benefits of that market would far outweigh its costs. Although private arbitrators will continue to play an important role, commercial dispute resolution will likely long remain dominated by public courts, which have important advantages in offering the type of principled adjudication that is needed to support contractual relations.

Global access to commercial adjudication will require reforms in the granting and recognition of jurisdiction based on choice of forum clauses, and in the enforcement of foreign judgments. These reforms can be undertaken by multinational convention, as with an appropriately amended version of the Hague Convention of 2005. Perhaps more feasibly, the needed reforms can also be undertaken by means of bilateral treaties and even by single states acting on their own.

These legal reforms, as well as the practical reforms that host jurisdictions must take to accommodate extraterritorial litigation, are far more likely to be forthcoming

if host jurisdiction courts can charge remunerative fees for adjudicating foreign cases that otherwise lack substantial ties to the forum. In some nations—and particularly among the federated states of the United States and the European Union—this may require an important adjustment in the legal culture. That adjustment is well worthwhile, however. Only by abandoning formal equality in court fees is it likely that real global equality in access to judicial services can be accomplished.